

CASE SUMMARIES
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MANDATORY FEE ARBITRATION

Prepared by the Committee on Mandatory Fee Arbitration
of the
State Bar of California
2005

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In Re Marriage of Wickander (1986) 187 Cal.App.3d 1364

Winterrowd v. American General Annuity Ins. Co., No. 01-57184, February 7, 2009

Woods v. Superior Court (1983) 149 Cal.App.3d .931

Yates v. Law Office of Samuel Shore (1991) 229 Cal.App.3d 583

CASE SUMMARIES

Prepared by the Committee on Mandatory Fee Arbitration
of the State Bar of California
Revised April 2016

A.I. Credit v. Aguilar & Sebastinelli (2003) 113 Cal.App.4th 1072

Client retained attorney in collection matter specifically because attorney had previously represented judgment debtor. Attorney did substantial work towards enforcing the judgment obligation, but judgment debtor thereafter moved to disqualify the firm based upon the historical conflict. The trial court disqualified attorney. Client returned to former law firm which was successful in collecting the unpaid judgment. Subsequently attorney sought fees for work on the case. A three-member MFA panel of the San Francisco Bar Association awarded \$213,000 in fees, specifically finding that there was no conflict of interest which should have disqualified attorney from representing client in the collection matter. Client then prevailed in a declaratory relief action which denied any fees. The Court of Appeal affirmed denial of attorney fees finding the attorney was disqualified from its representation. Notwithstanding that client had in fact specifically hired the particular firm because of its knowledge of the judgment debtor, the appeals court rejected the unclean hands argument and denied all fees.

Aguilar v. Lerner (2004) 32 Cal.4th 974

Client sued attorney for malpractice. Their fee agreement provided that the parties agreed to submit any disagreement concerning fees, the retainer agreement, or any other claim relating to the client's legal matter to binding arbitration under the rules of the San Francisco Bar Association and the Code of Civil Procedure of the State of California. Attorney petitioned to compel arbitration of the malpractice claim and her claim for unpaid fees. The court compelled binding arbitration and the matter was arbitrated under the local program's private arbitration program. The arbitration award denied client's claim and awarded fees to attorney. Client petitioned the court to vacate the unfavorable arbitration award. Attorney moved for confirmation of the award. The trial court entered judgment confirming the award.

The Supreme Court upheld the judgment, finding that the arbitration clause in the fee agreement did not violate the mandatory fee arbitration statute, even though it provided for binding arbitration, because client chose first to file a malpractice action and thereby waived any rights under the Mandatory Fee Arbitration program. A concurring opinion by Justice Chin, signed by Justices Baxter and Brown, also concluded that *Alternative Systems, Inc. v. Carey* (1998) 67 Cal. App.4th 1034, which held that the MFA statute preempted a binding arbitration clause in a fee agreement, has been overruled sub silento. Justice Moreno, concurring in but not signing the majority opinion, specifically differed regarding *Alternative Systems*. Justices Werdegar, who wrote for the majority, and Kennard were silent regarding the viability of *Alternative Systems*.

Aheroni v. Maxwell (1988) 205 Cal.App.3d 284

In an action by an attorney against his client for attorney fees, the trial court is not without jurisdiction to enter default judgment against the defendant notwithstanding plaintiff's failure to give defendant notice of his right to arbitration under B&P Code¹ section 6201(a). The burden is placed on the defendant to move for dismissal for failure to give the notice.

Alderman v. Hamilton (1988) 205 Cal.App.3d 1033

¹ California's Business & Professions Code.

Attorney filed suit against client alleging breach of attorney fee agreement for failure to pay a contingency fee for services rendered in resolving a will contest. The client acknowledged that fees were owing for work performed in resolving the will contest, but refused to pay the percentage fee specified in the contingency fee agreement because it did not comply with B&P Code section 6147.

In determining that attorney was not entitled to a percentage of the client's entitlement to the estate, the Court of Appeal affirmed the lower court's judgment on the sole ground that since the fee agreement did not meet the statutory requirements of B&P Code section 6147 (in that it did not include a statement of how disbursements would affect the contingency fee, did not discuss related matters, and did not state that the fee was negotiable), the client had an absolute right to void the contract whether before or after services had already been performed, leaving the attorney being entitled to the reasonable value of his services.

The Court also noted that attorney fee agreements are evaluated at time of their making and must be "fair, reasonable and fully explained to client", citing former Rule of Professional Conduct 2-107, and that attorney fee agreements are strictly construed against the attorney.

Alternative Systems. Inc. v. Carey (1998) 67 Cal.App.4th 1034

OVERRULED SEE: Schatz v. Allen Matkins Leck Gamble & Mallory LLP, 45 Cal.4th 557 (2009) below, for explanation

The election by the client to proceed with the Mandatory Fee Arbitration process preempts an arbitration clause in the fee contract. The fee arrangement provided that "In the event of any dispute arising under this Contract for Legal Services, . . . Client and Attorney agree that such dispute shall be resolved by binding arbitration to be conducted by the elected fee arbitration under the MFA statutes. Both Client and Attorney, however, rejected the MFA arbitration award, and Client filed a lawsuit in Superior Court for a trial de novo. Meanwhile, Attorney initiated an arbitration before AAA which ultimately made an award of \$171,062.46 plus costs in favor of Attorney. The Court denied Client's motion to vacate the award and granted Attorney's motion to confirm the award. The Court of Appeal reversed, holding the "[t]he MFA in effect at the time [client] invoked its protection preempted the AAA arbitration clause in the fee agreement. Therefore, the arbitrator exceeded his powers by purporting to render a binding award under authority of that preempted clause." In effect, the Court held that the binding arbitration clause was invalid because it would have made meaningless the statute's provision of a trial de novo from a MFA arbitration award.

Anderson v. Eaton (1930) 211 Cal. 113

Attorney represented client under a serious conflict of interest in that attorney previously represented an adverse party in a different proceeding. The Court found that even if the procurement of the employment was not fraudulent, the contract sued on was clearly against public policy and void due to the representations of adverse interests, which were not disclosed to the client. The Court further held that whether or not the intention and motives of the attorney were honest, the prohibition on dual employment is designed not only to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to

an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

Arnall v. Superior Court, (2010) 190 Cal. App. 4th 360

Tax attorney entered into a hybrid contingency fee agreements, the goal of which was to provide legal services aimed at “minimizing “the adverse economic impact” from certain taxable income. The agreements provided for a \$20,000 per month fixed payment for nine months and a “success fee” of one or two per cent of specified achieved savings. However, the agreements did not include the language required by Business & Professions Code §6147 that contingent fees are not set by law but are negotiable between the attorney and the client. In 2009, the client terminated the attorney and claiming that both of the agreements were void under the provisions of Business & Professions Code §6147 because the attorney had failed to recite in either agreement that the success fees were “not set by law but [were] negotiable between attorney and client.” The attorney filed suit to recover his fees under the two agreements. The client moved for summary adjudication on the grounds that agreements were voidable and that the attorney was only entitled to seek quantum meruit. The trial court denied the motion, relying on case law pertaining to the former version of Section 6147, holding that Section 6147 was inapplicable to contingency fee agreements outside of the litigation context. The Court of Appeal issued a writ of mandate, holding that Section 6147 had been amended, replacing the term plaintiff” with “client” and that the intent of the amendment was that Section 6147 applies to contingent fee agreements for both litigation and transactional work. The court also held Section 6147 applies to hybrid agreements such as the one in that case. Because the attorney had failed to include the mandatory language of Section 6147, he was limited to recovery based on quantum meruit...

Bach v. State Bar (1991) 52 Cal.3d 1201

Client retained attorney to obtain a dissolution of her marriage and paid him \$3,000 in advance. Attorney thereafter failed to communicate with client for months at a time despite repeated telephone calls and office visits; never obtained the dissolution; purported to withdraw from the dissolution proceeding without the consent of the client or the court; and failed to return the unearned portion of the fees advanced. Client invoked arbitration proceedings against attorney in an attempt to recover the unearned fees paid. Attorney refused to appear at the arbitration hearing claiming that he had not been served with a notice of arbitration, although he did mail to the arbitrator his declaration disputing the merits of client’s claim. The arbitrator found that client was entitled to a refund of \$2,000 and notified the parties that his decision was not binding but would become so in 30 days unless a petition seeking review de novo was filed with the appropriate court. No petition for review of the arbitrator’s decision was filed.

Attorney argued to the Supreme Court that the arbitrator lacked jurisdiction to adjudicate the fee dispute and that the State Bar and the Supreme Court had no jurisdiction to impose discipline in a proceeding that is merely a means of enforcing the arbitrator’s fee award to client. The Court disagreed, stating that the basic objectives of attorney discipline are the protection of the public, the preservation of confidence in the legal profession, and the rehabilitation of errant attorneys where appropriate and that ordering restitution in cases of financial injury is a rehabilitative measure designed to further the state’s disciplinary objectives. The Court rejected “as frivolous [attorney’s] argument to the contrary.”

Baranowski v. State Bar (1979) 24 Cal.3d 153

The State Bar recommended a one-year suspension of an attorney who, among other things, violated then Rules of Professional Conduct, Rule 8-101 (providing that all funds received or held for the benefit of clients including advances for costs and expenses shall be deposited in a trust account). The Supreme Court agreed with the recommended discipline, but did not base its determination on the trust account violation, specifically stating that it need not decide if Rule 8-101 was violated because the recommended suspension was fully warranted by the attorney's other misconduct. However, in discussing what advance fees must be placed in a client trust account, the Court explained that a "classic retainer" is not a sum of money "received or held for the benefit of clients" within the meaning of Rule 8-101 and therefore need not be deposited in the attorney's trust account. In a footnote, the Court defined a "classic retainer" as "a sum of money paid by a client to secure an attorney's availability over a given period of time" which is "earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client."

Barnum v. State Bar (1990) 52 Cal.3d 104

Attorney Barnum received \$10,000 in advance for attorney fees to handle a bankruptcy matter for Mr. Rivezzo. A month and a half after his receipt of the \$10,000, Barnum filed a bankruptcy petition on behalf of Rivezzo. About four months after the petition was filed, Barnum withdrew as attorney of record. According to Rivezzo's new counsel, Barnum "'fundamentally mishandled' the case by (1) failing to protect certain commercial leases as assets of the bankrupt estate, and (2) misinforming the bankruptcy court that certain corporate debts were the client's personal debts." The State Bar Court found that, among other misdeeds, Barnum collected an unconscionable fee in violation of the Rules of Professional Conduct. The Supreme Court agreed that "the evidence establishes that [Barnum] provided wholly inadequate services in exchange for the fee", and wryly noted that "the unconscionable fee violation, standing alone, warrants a minimum 'six-month actual suspension ... irrespective of mitigating circumstances.'"

Beery v. State Bar (1987) 43 Cal.3d 802

A fiduciary relationship between lawyer and client does not require a formal agreement and extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result. An attorney client relationship is formed when an attorney renders advice directly to a client who has consulted the attorney seeking legal counsel. (43 Cal.3d at 811.)

Bell v. Shine, Browne & Diamond (1995) 36 Cal.App.4th 1011

Attorney Bell was a contract attorney engaged by the defendant firm to work on the underlying personal injury action filed in Nevada County. The defendant firm agreed that Bell was to receive two-thirds of the contingency fee recovery in the underlying case. However, Bell did not have any agreement with the plaintiff in the underlying case. When Bell was later on substituted out of the case, he claimed entitlement to his fees by filing an attorney's fee lien in the Nevada County case. The plaintiff in the underlying case then moved the Nevada County Superior Court to expunge Bell's lien, and to declare that Bell was not entitled to any fees. Bell appeared at the hearing on the motion, and argued against the motion. The Nevada County Superior Court granted the motion, and entered an order denying Bell any fees. Bell did not appeal the order.

Instead, Bell initiated another action, for declaratory relief relating to the fee-sharing agreement. The San Francisco court dismissed Bell's action, on the basis that the Nevada County Superior Court's order barred this new action, under theories of collateral estoppel, disfavor of collateral attack, and res judicata.

Benjamin, Weill & Mazer v. Kors: (2011) 195 Cal.App.4th 40

A law firm sued its former client to collect unpaid attorney fees. The attorney served the client with notice of her right to fee arbitration under Mandatory Fee Arbitration Act. The client applied for non-binding fee arbitration in Contra Costa County. The law firm objected on jurisdictional grounds, contending that the fee agreement required binding arbitration through Bar Association of San Francisco (BASF) and filed a motion to compel contractual arbitration through the BASF pursuant to the arbitration clause in the fee agreement. The trial court granted the motion and directed the parties to submit their dispute to BASF for binding contractual arbitration pursuant to BASF's fee arbitration rules. The BASF appointed a panel of three arbitrators. The arbitration panel issued an award directing that the client pay a total of \$102,287.39 for unpaid fees and costs and accrued interest. The law firm filed a motion to confirm the award and the client filed a motion to vacate the award. The client's petition to vacate was primarily based on the claim that the chief arbitrator failed to disclose that he was representing a prominent law firm in pending case relating to an attorney-client fee arbitration dispute (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP*) and that his primary clientele as an attorney were other law firms in legal malpractice cases and fee disputes. The trial court confirmed the award in favor of the law firm and the client appealed. The Court of Appeal originally reversed the trial court's holding (*Benjamin, Weill & Mazer v. Kors* (2010) 189 Cal.App.4th 126), holding pursuant to C.C.P, §1281.9(a) of the California Arbitration Act (CAA) that the chief arbitrator was required to disclose that his practice focused upon representing lawyers in litigation with former clients.

The Court of Appeal ordered a rehearing after the Presiding Arbitrator of the Mandatory Fee Arbitration Program requested depublication of the opinion. Following rehearing, the Court of Appeal held that the disclosure requirements set forth in C.C.P, §1281.9 do not apply to arbitration conducted pursuant to the Mandatory Fee Arbitration Act (Business & Professions Code, § 6200, et. seq.) The court noted the distinction between arbitration under the CAA, which is based on the parties' agreement to arbitrate, and arbitration under the MFAA, which is based on a statutory directive and is voluntary for the client but mandatory for an attorney is requested by the client. The Court of Appeal also held that it was error for the trial court to have ordered binding arbitration pursuant to BASF's mandatory fee arbitration program and rules. The court held that the provision in the parties' fee agreement requiring submission of their fee dispute pursuant to binding arbitration to BASF's mandatory fee arbitration program and rules was "legally impermissible" under the MFAA, which provides that arbitration is non-binding unless the parties agree after a dispute has arisen that the arbitration will be binding.

[NOTE: a request for depublication of the opinion and a petition for review by the California Supreme Court are pending as of July 20, 2011.]

Bernstein v. State Bar (1990) 50 Cal.3d 221

An attorney was disciplined by the State Bar for various lapses in his duties to the client. The attorney objected to the discipline contending that the client had not paid the full agreed retainer, the attorney had never filed the substitution of attorney form to become counsel of record before his services were terminated, and the written fee agreement under which the work was to be performed for the client had been between the client and a professional corporation of which the attorney was a shareholder and not between the client and the attorney individually. The Supreme Court found the recommended discipline appropriate because, among other reasons, the attorney had led the client to believe that he would handle the litigation and thus the mere fact that the retainer had not been fully paid and the substitution had not been filed before the client discharged him did not preclude the finding of an attorney-client relationship sufficient to support the recommended discipline. Also, the Supreme Court held that the retainer agreement with the professional corporation would not provide a veil to cloak the attorney's professional lapses because the client had dealt directly with the attorney and reasonably expected him to perform the services for which the client had agreed to pay. A formal contract was not necessary to show that an attorney-client relationship had been formed.

Betz v. Pankow (1995) 31 Cal.App.4th 1503

An arbitrator who was once a partner in a law firm which represented three businesses in a lawsuit in which a defendant had an interest was held not to be biased such that his awarded should be vacated. The Court cited the following factors in support of its conclusion that "a reasonable person, knowing all the facts and looking at the circumstances at the time" would not question the arbitrator's impartiality. The law firm represented the businesses in only one litigation, the law firm had more than 127 lawyers at that time, the arbitrator was no longer at the firm, never met defendant, was unaware his former firm had ever represented defendant's businesses, and no longer had access to the firm's files.

BGJ Associates v. Wilson (2003) 113 Cal.App.4th 1217 (2003), petition for review denied February 18, 2004

Business transaction with client in violation of Rule 3-300 voids fee agreement

Attorney entered into business transaction with client and others. The deal went bad, and the attorney attempted to enforce the business agreement. The attorney had never secured a written Rule 3-300 conflict waiver from the client, although at one point client had consult independent counsel on advice of attorney. The trial court found strong evidence of undue influence and therefore violation of fiduciary duty, holding that the fee agreement was unenforceable. The Court of Appeal affirmed. Probate Code section 16004 applies to the fiduciary relationship between attorney and client. (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917. Accordingly, [a] transaction between an attorney and client which occurs during the relationship and which is advantageous to the attorney is presumed to violate that fiduciary duty and to have been entered into without sufficient consideration and under undue influence. (*Lewin v. Anselmo* (1997) 56 Cal.App.4th 694, 701.)

Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal.4th 119

In this case, the Supreme Court held that a fee agreement is invalid to the extent it authorizes payment for the substantial legal services an out of state law firm performed in California.

Here, a California corporation (the client) sued its New York law firm (the attorney) for legal malpractice, and the attorney cross-complained for attorneys fees earned for work performed in both California and New York. The trial court granted the client's motion for summary adjudication of the cross-complaint finding that the parties' fee agreement, which stipulated that California law governed all matters in the representation, was unenforceable since none of the attorneys in the firm were licensed to practice law in California as required by B&P Code section 6125. The Court of Appeal affirmed. The Supreme Court affirmed the Court of Appeal to the extent it concluded that the firm's representation in California violated B&P Code section 6125, and that the firm was not entitled to recover fees under the fee agreement for its services in California. However, the Supreme Court reversed to the extent the Court of Appeal's decision did not allow the attorney to argue in favor of a severance of the illegal portion of the consideration (the California fees) from the rest of the fee agreement, and remanded for further proceedings since the agreement might be valid to the extent it authorized payment for limited services attorney performed in New York. The Supreme Court stated "No one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar." The Court said that physical presence is one factor in deciding whether the unlicensed lawyer has violated B&P Code section 6125, but it is by no means exclusive and each case must be decided on its individual facts. For example, though not physically present in California, advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means can be a violation of section 6125. Further, exceptions do exist, but are generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal in a particular pending action or as counsel pro hac vice.

Blickman Turkas v MF Downtown Sunnydale 162 Cal.App. 4th 858 (2008)

In 7 page review of cases in the area, court holds that the mere assertion of a right to attorney fees does not create an estoppel to deny other party's right to recover unless the party would have been entitled to attorney fees if it had prevailed. Claimant was a 3rd party beneficiary of the contract, both the complaint and the cross complaint were dismissed by the court (after large fees incurred by both parties). Just because the opponent asked for fees (although not entitled to them), does not mean that other side therefore has an entitlement to fees being taxed as costs against the losing side.

Blum v. Stenson (1984) 465 U.S. 886

This case primarily deals with the issues of determining reasonable fees in the context of a civil rights action handled by a legal aid society. The legal aid society did not have a fee agreement with its clients. The Supreme Court held that (1) "reasonable fees" in federal civil rights actions are to be calculated according to prevailing market rates in relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel; (2) court is authorized, in its discretion, to allow prevailing party upward adjustment in attorney fees in cases of exceptional success; and (3) in this case, clients failed to carry their burden of justifying entitlement to upward adjustment.

[Note This case certainly provides a clear basis for using prevailing rates in the community in determining reasonableness of fees, at least in the context of a federal civil rights action.

However, attorney fees in a federal civil rights action is exclusively a determination by the court and, therefore, is not within the jurisdiction of mandatory fee arbitrations under California law.]

Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal.App.4th 1085

An arbitrator's failure to disclose that he had been retained by defendants' law firm as an expert witness only a few weeks before the arbitration may be grounds for vacating the arbitration award.

Brown v. Superior Court (2004) 116 Cal.App.4th 320

Attorney fee lien not assertable in client's judgment enforcement proceeding

Attorney attempted to assert his contractual lien for fees in a case between former client and the debtor. The Court of Appeal held that, as a non-party to the action, the attorney could not do so. Attorney's lien priority and the amount could be litigated in such a way to protect against his former client pocketing the proceeds of the judgment lien without protecting the attorney's right to fees. The court had an obligation to consider the existence of the possibly senior lien claim and regulate its action on the judgment lien accordingly as the attorney prosecuted a separate action.

Byerly v. Sale (1988) 204 Cal.App.3d 1312

After trial court referred medical malpractice action to binding arbitration, pursuant to arbitration provision in contract, court no longer had any reason to entertain motion for dismissal after 5 years; trial court's only involvement would be limited to confirming, correcting or vacating any arbitration award.

Cal Pak Delivery, Inc. v. United Parcel Service, Inc. (1997) 52 Cal.App.4th 1

Plaintiffs' counsel, who "labored on this case for three years before committing the actions resulting in his disqualification", secretly contacted defendant UPS and offered to sell out the plaintiffs for the sum of \$8 to \$10 million. UPS reported the offer to the court. Not only did the trial court disqualify the attorney, it also barred the attorney from receiving any fees, "either before or after his admitted ethical misconduct." The Court of Appeal reversed the part of the order prohibiting the attorney from receiving his fees as overbroad, holding out the possibility that the disqualified attorney might nevertheless be entitled to the fees (1) as to which there was no objection by his clients (citing *Clark v. Millsap* (1926) 197 Cal. 765), (2) for services rendered before the ethical breach (citing *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, or (3) on an unjust enrichment theory where the client's recovery was a direct result of the attorney's services (citing *Estate of Falco* (1987) 188 Cal.App.3d 1004.)

Campbell v. Cal-Guard Surety Services Inc. (1998) 62 Cal.App.4th 563

A plaintiff sued his insurer for contract benefits and obtained an award of \$2,500 in contract damages, which was the maximum amount due under the policy. In affirming the jury verdict, the Court of Appeal remanded the case and ordered the trial court to award plaintiff \$13,010 in attorney fees.

Cassel v. Superior Court (2010) 51 Cal.4th 113; 11 Cal. Daily Op. Serv. 546; WL 102710

MEDIATION PRIVILEGE:

Client brought legal malpractice action against his former attorneys alleging that they had forced him to settle a business dispute at mediation for \$1.25 million rather than a higher amount the client had said was acceptable. Prior to trial, the law firm filed a motion in limine to exclude evidence of communications between the attorneys and the client both during mediation, but outside presence of mediator and opposing parties, and during the three days prior to the mediation. The trial court granted the motion, holding that the communications were protected by the mediation privilege (Evidence Code §1119). The court of appeal granted the client's petition for writ of mandate and directed the trial court to issue a new order denying the attorneys' motion in limine, holding that the conversations were not protected by the mediation privilege because they were communications between the attorneys and their client that took place outside the presence of the mediator or opposing counsel and making reference to the communications in a subsequent legal malpractice action was not prohibited.

The Supreme Court granted review and reversed. The Supreme Court held that private communications between an attorney and client related to mediation remain confidential even in a lawsuit between the two. The Supreme Court determined that the court of appeal's decision contravenes the Legislature's specific command that unless the confidentiality of a particular communication is expressly waived by all mediation participants all mediation communications are confidential and inadmissible in any civil action, including for purposes of proving a claim of legal malpractice. The Supreme Court acknowledged the concerns of the court of appeal that attorneys should not be permitted to use the mediation privilege to effectively shield an attorney's actions during mediation, but concluded that the Legislature's intent to encourage mediation to resolve disputes required broad protection for the confidentiality of communications exchanged in that process, even where the protection may sometimes result in the unavailability of valuable evidence in civil actions, including legal malpractice claims.

Cazares v. Saenz (1989) 208 Cal.App.3d 279

Calculation of the reasonable value of services rendered by a lawyer under a contingent fee contract requires a court to quantify the value of the lawyer's services and to prorate that amount against the value of the services rendered by all lawyers on the case. A mechanical use of hours expended multiplied by a prevailing hourly rate is an overly narrow view of the quantum meruit rights announced in *Fracasse*. The resulting fee may exceed what would otherwise be considered reasonable, based on the economic risks and incentives inherent in a contingent fee arrangement.

Chambers v. Kay (2002) 29 Cal.4th 142

Fee sharing agreement void for non-compliance with Rule 2-200

Rule 2-200 voids a written promise by trial counsel to pay assistant counsel for work done as co-counsel, even though agreement had been copied to the client, because the client had not been asked to approve the agreement in writing, notwithstanding that in the years while the case was pending she had never disapproved the fee-sharing arrangement. As to the remaining claim for quantum meruit the Supreme Court affirmed that the violation of Rule 2-200 precluded any

division of fees between the attorneys but did not provide any direction as to how reasonable fees should otherwise be determined. But see *Huskinson & Brown v. Wolf*, *infra*

Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970

TRIAL COURT DISCRETION TO DENY FEES

In *Chavez*, a police officer brought action against city and supervisor for discrimination, based on retaliation for complaining about harassment and discrimination. The trial court awarded damages of \$11,500, but denied the officer's motion under Fair Employment and Housing Act (FEHA) for attorney fees in excess of \$870,00, holding that it had the discretion pursuant to C.C.P. §1033(a) to deny awarding fees and costs where the prevailing party recovers a judgment that could have been rendered in a limited civil case. The officer appealed and the Court of Appeal reversed, holding that the trial court had "applied the wrong statutory standard and abused its discretion" and that "section 1033 does not apply in actions brought under the Fair Employment and Housing Act (FEHA). The Supreme Court reversed, resolving the interaction between the FEHA (which provides that the prevailing party may recover attorney's fees and costs) and C.C.P. §1033(a) (which give the court discretion to deny fees when "the prevailing party recovers a judgment that could have been rendered in a limited civil case, but the action was not brought as a limited civil case. The Supreme Court sided with the trial court and held that C.C.P. §1033(a) gives a trial court discretion to deny attorney fees to a plaintiff who prevails on a FEHA claim but recovers an amount that could have been recovered in a limited civil case. The Supreme Court concluded that, in light of plaintiff's limited success, marginal evidence of damages and inflated attorney fee request, the trial court did not abuse its discretion in denying attorney fees.

Clark v. Millsap (1926) 197 Cal. 765

An attorney advised his client, who was about to be sued by a third party, to transfer all her tangible assets to a "holding corporation" in order to shield the assets from any judgment that might result. The attorney controlled the holding corporation and, over time, liquidated most of the assets and refused to return any of the proceeds or the assets to the client. After crediting the attorney with \$7,500 in attorney fees, the trial court entered judgment of \$31,394.54 in favor of the client. On appeal, the attorney argued that he should have been given a credit of \$20,000 as and on account of his attorney fees. The Supreme Court affirmed the judgment, quoting from 6 Cor. Jur. 722 "Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties." However, the Supreme Court did not disturb the \$7,500 credit for his fees which the trial court gave the attorney because the client did not object to the allowance of this sum.

Cohen v. Brown (2009) 173 Cal. App.4th 302

Fee Sharing Absent Rule 2-200: Lawyer who acts in case without Rule 2-200 agreement may share fees under quantum meruit theory if party he or she represents had reasonable expectation that attorney would receive fees. Rule 2-200 agreement need only be signed before the fee is shared, not before work in the case commences.

In a personal injury case, an attorney Cohen was associated into a case by attorney Brown to

share work and fees, and Brown made a false representation to Cohen that the client had signed a Rule 2-200 fee sharing agreement. After settlement was imminent, the Brown “fired” Cohen, who then filed claims of breach of contract and for quantum meruit. The court affirmed *Chambers v. Kay* (2002) 29 Cal.4th 142 and *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, both of which prohibit recovery in a breach of contract suit for fees filed by an attorney against another attorney when there is no compliance with rule 2-200. However, the court held that *Huskinson* also made clear an attorney could succeed under quantum meruit, since Rule 2-200 only addresses the division of fees that the client paid or agreed to pay, and quantum meruit is based on the reasonable value of services. It is equitable based on the fair expectations of the parties, and not on the contract. The court also that Rule 2-200 only requires that the client’s consent to a division of fees be given prior to the actual division of the fees, not prior to the commencement of work by the associated in attorney/law firm. *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838.

Colello v. Yagman, Aug. 17, 2009, Cal 2nd Dist., Div 4. Not Published

STATUTE OF LIMITATIONS ON FEE REFUND: An attorney’s failure to refund client fees constitutes either breach of contract or fiduciary duty, both of which are subject to a one year statute of limitations. Such claims arise when the client becomes entitled to the refund, not when the client requests it.

In an MFA, the arbitrators found that because the federal court had disqualified attorney Yagman from representing client Colello in his criminal action, Colello was entitled to a refund of that portion of the fees paid to Yagman that were not earned at the time of the disqualification. Yagman sought trial de novo, arguing that no refund was owed because the statute of limitations had time-barred Colello’s claim for payment of unearned fees.

An attorney’s failure to provide refund of unearned fees is either a breach of contract or a breach of fiduciary duty. In either case, the wrongful act or omission arises in the performance of professional services, both of which are subject to the one-year limitations period of CCP §340.6. Section 340.6 applies to contract and tort claims arising from the attorney-client relationship.

The limitation period commences when the client discovers or through the use of reasonable diligence should have discovered the facts constituting the wrongful act or omission. For fee refunds, it commences when the funds become due and owing to the client (here when the court issued the order disqualifying Yagman from representing Colello), not when the fees are requested by the client, because the actual harm occurs at that time.

The court also stated that CCP §352.1, tolling causes of action when a plaintiff is imprisoned at the time that a cause of action accrues, does not apply because the cause of action accrued before Colello went to prison.

Commonwealth Coatings Corp. v. Continental Casualty Co. (1968) 393 U.S. 145

Arbitrators are required to disclose to the parties any dealings that might create an impression of possible bias. Courts should be even more scrupulous to safeguard the impartiality of arbitrators than judges, since arbitrators have completely free rein to decide the law as well as the facts and are not subject to appellate review. In this case, the U.S. Supreme Court ordered that an arbitration award be vacated under section 10 of the United States Arbitration Act due to the arbitrator's failure to disclose sporadic but substantial business relationship with a party. (393 U.S. at 149.)

Corona v. Amherst Partners (2003) 107 Cal.App.4th 701

Failure to seek attorney fees in real estate arbitration bars request in court action

Where a party to a real estate purchase contract is required by contract to submit a dispute to binding arbitration but does not request that the arbitrator decide his entitlement to attorney fees even though that issue was part of the submission, a trial court may not nonetheless determine that issue and make an award of fees and costs incurred in the arbitration.

Cotchett, Pitre & McCarthy v. Universal Paragon Corp. (2010) 187 Cal.App.4th 1405

CONTINGENT FEE AGREEMENTS

This case involved a complex and novel fee agreement between a sophisticated corporate client and a law firm. The corporation, Universal Paragon Corp. (UPC), owned property which was being contaminated by waste from a neighboring site owned by the Ingersoll-Rand Corporation. UPC wanted to gain ownership of the site and retained the law firm of Cotchett, Pitre & McCarty to develop a litigation strategy to obtain the site. The parties entered into a contingent fee agreement which they negotiated over several months. The agreement provided that if UPC acquired the property, the Cotchett firm would be paid an amount equal to the value of the property or 16% of the cost of cleaning the site, whichever was greater. The case settled with UPC acquiring the property. The Cotchett firm sent a letter claiming legal fees of over \$19 million, reflecting 16% of the damage range set forth in UPC's settlement statement. UPC took the position that the contingency should be calculated based on the actual value of the property and cash received in settlement, not on its damage calculations. Pursuant to the terms of the fee agreement, the fee dispute was submitted to arbitration with JAMS. The arbitrator awarded the Cotchett firm \$7,554,149.13 in fees based on applying the 16% contingency on UPC's lower (\$50 million) damage assessment. The trial court granted the law firm's petition to confirm the award. UPC appealed, claiming that the \$7.5 million fee was unconscionable. The court of appeal affirmed, holding that the fee was not unconscionable under Rule of Professional Conduct 4-200(B). The court held that the litigation was complex and required a high degree of skill and that the contingency fee agreement reflected an attempt by equally sophisticated parties to share the risk of complex litigation

David Welch Co. v. Erskine & Tulley (1988) 203 Cal.App.3d 884

A collection agency's former attorneys acquired some of its collection accounts by using confidential information obtained in the course of the former representation, without first notifying and obtaining its informed consent. The court held that the attorneys breached their fiduciary duties (Rules of Professional Conduct Rules 4-101 and 5-101) to their former client and

impressed a constructive trust on the revenues received by the attorneys from the collection work done for those accounts.

Delaney v. Dahl (2002) 99 Cal.App.4th 647

C.C.P. §1286.6 permits an arbitrator, upon written request, to correct a final award when there has been an evident miscalculation or mistake in the description of any person or property referred to in the award, or the award is imperfect in a matter of form not affecting the merits of the controversy. This includes adding the name of a party to be bound by the award, if the arbitrator was authorized to adjudicate the controversy, even though the name had been omitted from the award. The arbitration award may be amended at any time prior to judicial confirmation of the award, irrespective of statutory or rule time limits for petitions to correct awards

E.O.C. Ord, Inc. v. Kovakovich (1988) 200 Cal.App.3d 1194

Attorney sent letter to clients which spelled out all the terms of their fee agreement. The parties discussed these terms during a telephone conversation, and the clients unequivocally accepted these terms. Court held that Attorney's action for fees was governed by the 4-year statute of limitations for written contracts, not by the 2-year statute for oral contracts.

[Note the fee agreement in this case provided for a contingency fee. Client refused to pay the contingency fee on April 18, 1990. Attorney filed suit for breach of contract on January 11, 1994. B&P Code section 6147 which in its present form requires that all contingency fee agreements be in writing and signed by the client, was enacted in 1982. Until section 6147 was amended in 1986, it did not specifically state that the contingency fee contract be in writing, although it appeared clear from the language used that a written fee agreement was contemplated. In any event, the court in this case did not discuss section 6147, presumably because the fee contract in that case predated the enactment of section 6147.]

Enpalm LLC v Teitler Family Trust 162 Cal.App 4th 770 (2008)

In matter where counsel requested contractual attorney fees against losing party, court applied loadstar method, then reduced those by 90% based on finding that attorney time was unnecessarily incurred (as a result of actions by their client, who had prevailed in the underlying case.)

Epstein v. Abrams (1997) 57 Cal.App.4th 1159

Plaintiffs reached a settlement with one of several defendants. The settlement was reduced to a judgment in that case. Then, the settling defendant's attorney withdrew and filed a lien in that action. Plaintiffs thereafter reached a settlement with all defendants as a group. One of the terms of the settlement was that the defendant who had previously obtained the judgment file a satisfaction of that judgment. On motion, the court approved the settlement and ordered the satisfaction of judgment be filed. The Court of Appeal set the order aside as exceeding the court's jurisdiction, reaffirming the principle that the court in which the case giving rise to an attorney's claimed lien for fees is pending lacks jurisdiction to determine the validity of the claimed lien. It also held that the validity of the attorney's lien claim was not subject to determination under the judgment lien statutes (C.C.P. section 708.410 et seq) or the attachment

statutes (C.C.P. section 491.410 et seq.) Finally, it held that a court could not approve a settlement in a case which attempted to defeat an attorney's claimed fee lien.

Estate of Falco (1987) 188 Cal.App.3d 1004

In this will contest case, in which the parties ultimately entered into a settlement agreement, the trial court denied recovery of (contingent) fees to the contestants' attorneys who withdrew before the settlement was solidified because the contestants refused to follow the attorney's recommendation to settle, and ostensibly refused to cooperate. The Court of Appeal affirmed, holding that while an attorney working under a contingent fee who is forced to withdraw for ethical cause retains a right to reasonable compensation, substantial evidence supported the trial judge's conclusions that in this particular case, the attorney did not have good cause for withdrawal and in any event the settlement was not the direct result of the withdrawn attorney's labor. The Court of Appeal also held that a client's right to reject settlement is absolute, so that a client's refusal to settle cannot in itself constitute good cause for the attorney's withdrawal.

Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351

WAIVER OF MFA: By cross-demanding in separate binding arbitration proceeding for affirmative relief based on allegation of malpractice, client waived right to MFA under MFAA.

Client Smylie initiated MFAA nonbinding arbitration after Firm Fagelbaum & Heller (F&H) initiated a separate lawsuit & AAA binding arbitration for its fees and costs for work performed for Smylie. In the AAA arbitration, Smylie filed an answer and cross-claim demanding for affirmative relief of a fee refund (that had been paid to F&H in the form of rental credits), alleging F&H had committed malpractice and caused Smylie damages. The trial court granted F&H's motion to compel AAA arbitration and further consolidated the MFAA arbitration with the AAA arbitration. The court further ordered if AAA determined that any of the claims were not subject to an arbitration agreement, the claims would remain in court. After AAA issued an award in favor of F&H, Smylie appealed, arguing that he had been denied his MFAA right to non-binding arbitration by the court's consolidation order.

The court of appeal found that because Smylie asserted a claim for affirmative relief for damages in the AAA arbitration based on an allegation of malpractice, he waived his MFAA right pursuant to BPC §6201(d)(2). In order for AAA to resolve the cross-claim, it had to determine whether F&H committed malpractice, thus entitling Smylie to a deduction from fees and costs for damages caused to him by malpractice. As a result, the AAA cross-claim met BPC §6201(d)(2)'s waiver for MFAA

Fair v Bakhtiari (2011) 195 Cal.App.4th 1135

Attorney Fair had a preexisting legal relationship with client when he entered a series of business transactions with client. Fair gave legal advice as well as participated in the businesses with his client. The transactions were tremendously successful, so there was no allegation that the client was "harmed" by Fair's counsel. Fair conceded that he did not comply with CRPC 3-300, so he abandoned his claim to enforce the business deal, but sought to amend his Complaint to recover in quantum meruit for the value of the legal services provided (separate from his alleged equity

interest in the transaction). The Court did not allow Fair to amend. Where there is an attorney/client relationship, undue influence is presumed. Client would have to show actual harm to obtain affirmative relief, but not to refute claim for quantum meruit fees. Quantum meruit fees are denied where there has been a serious breach of CRPC that goes to the heart of the matter/relationship.

In the Matter of Stanley Feldsott (St.Bar Court 1997) 3 Cal.State Bar Ct. Rptr. 754

Shortly before trial, the client replaced his attorney. The attorney asserted a lien for \$5,000 based on a written fee agreement providing for a flat fee of \$2,000 plus 25% of any gross recovery. After the underlying case settled for \$26,500, a draft for that amount was issued to the client, the first attorney, and the attorney who was substituted into the case. The first attorney suggested that \$5,000 of the draft amount be placed into a blocked account pending resolution of his fee claim. The client refused. The attorney then refused to endorse the draft for delivery to the client. The State Bar instituted disciplinary proceedings against the attorney, claiming that he had a duty under Rule 4-100(B)(4) to endorse the draft and deliver it to the possession and control of his former client. The Review Department of the State Bar Court dismissed the charges with prejudice, opining that what the attorney did constituted reasonable and appropriate steps to protect his lien.

Figi v. New Hampshire Ins. Co. (1980) 108 Cal.App.3d 772

A “neutral arbitrator” chosen by two arbitrators each of whom was selected by each side to the dispute must disclose significant or substantial business dealings with a party or the party’s representatives, to avoid the appearance of impropriety. Because arbitrators are selected for their familiarity with the type of business dispute involved, they are not expected to be entirely without business contacts in the particular field, but they should disclose any repeated or significant contacts which they may have with a party to the dispute, his attorney or his chosen arbitrator.

Fineberg v. Harney & Moore (1989) 207 Cal.App.3d 1049

The Court of Appeal held that, on public policy grounds, a client may not waive the limitation on contingency fees in medical malpractice actions imposed by B&P Code section 6146, and that such limitation does not amount to a deprivation of the client’s right to counsel.

Finley v. Saturn of Roseville (2004) 117 Cal.App.4th 1253

Courts lack jurisdiction to rule upon matters contained within the scope of an arbitration agreement once the matter has been order to arbitration and until the arbitration has been concluded as contemplated by the arbitration agreement.

Flatt v. Superior Court (1994) 9 Cal.4th 275

Plaintiff, being dissatisfied with the services of Attorney A, consulted with Attorney B. Attorney B, however, declined representation because her firm represented the Attorney B in an unrelated matter. Almost two years later, plaintiff sued both attorneys for malpractice because the statute

of limitations to file his underlying claim had by then lapsed. Plaintiff claimed that Attorney B had a duty to warn him about the running of the statute of limitations. Attorney B moved for summary judgment, arguing that as a matter of law, she had no obligation to give plaintiff any advice which would operate to the detriment of Attorney A, her client. The trial court denied the summary judgment motion, and the Court of Appeal affirmed. The Supreme Court reversed, holding that Attorney B's duty of undivided loyalty to Attorney A, her client, negates any duty on her part to inform the second client of the statute of limitations applicable to the proposed lawsuit or even the advisability of seeking alternative counsel.

[Note The Supreme Court cautioned that this is a narrow holding confined to the circumstances typified by the facts in this case - one in which the attorney is confronted with a mandatory and unwaivable duty not to represent the second client in light of an irremediable conflict with an existing client and acts promptly to terminate the relationship after learning of the conflict.]

Fletcher v. Davis (2004) 33 Cal.4th 61

Attorney charging lien in fee agreement subject to Rule 3-300 disclosure requirements
The Supreme Court took up the preceding case on the issue of enforcement of fee liens in hourly fee agreements. Holding that these presented an inherent ethical conflict, the Court ruled that such liens are unenforceable unless in writing and the attorney has complied with Rule 3-300 (which includes the requirement of advising the client of the right to advice of independent counsel on the matter).

Fracasse v. Brent (1972) 6 Cal.3d 784

When a client discharges an attorney who was working under a contingent fee agreement, without good cause, the attorney is entitled to the reasonable value of his services (quantum meruit) if the client ultimately wins a recovery. The attorney's right to payment does not mature unless and until the client wins a recovery. The court does not define how to calculate quantum meruit, but suggests that the task calls for the trier of fact to weigh all of the facts and circumstances. The court notes that a reasonable fee could be 100% of the fee called for under the contingent fee contract, such as if the client discharged the attorney "on the courthouse steps" and settled the case in the next breath.

Franklin v. Appel (1992) 8 Cal.App.4th 875

In this matter, clients retained attorney to represent them in a commercial real estate matter. In a subsequent fee dispute, clients appealed a judgment awarding the attorney \$750,000 in fees. Clients contend that they should be able to void the contingency agreement because it did not meet all of the requirements of B&P Code section 6147, and that the lawyer should be entitled to a reasonable fee.

The court found that section 6147, as then in effect, applies only to litigation matters where the attorney represents the plaintiffs, and not to all other contingency arrangements. The court notes that with enactment of section 6148, "it would appear that the Legislature believed it had now covered the entire field of attorney/client fee arrangements," but that "[t]he large gap in section 6147 cannot be cured by the subsequently enacted broad language of section 6148." [Section 6147 has since been amended to make it applicable to all contingency cases, whether plaintiffs' or defendants' cases.]

Gisbrecht v. Barnhart (2002) 535 U.S. 789, 122 S.Ct. 1817

Citing ABA Formal Opinion 94-389, ABA/BNA Lawyers' Manual On Professional Conduct, this opinion contains an excellent discussion of the surprisingly recent introduction of hourly fee legal services billing in the United States

Glaser, Weil, Fink, Jacobs, & Shapiro, LLP v. Goff (2011) 194 Cal.App.4th 423

The parties participated in an MFA fee arbitrations under the rules of the Los Angeles County Bar Association. The panel of arbitrators concluded that the parties had agreed to binding arbitration and issued an award in favor the law firm. When the law firm petitioned the court to confirm award, the client opposed the petition arguing that the arbitrators exceeded their powers by issuing a binding award when the clients had not agreed to binding arbitration. The trial court granted the law firm's petition to confirm the award and the clients appealed. The Court of Appeal reversed, holding that the arbitrators' decision that the award was binding was in excess of their powers and that the trial court should have independently reviewed whether the parties had agreed to make the arbitration binding.

Glassman v McNab (2003) 6 Cal.Rptr. 3rd 293

After dispute arose, the client and attorney stipulated to binding arbitration and, in a handwritten addendum initialed by each, stated that it is understood that jurisdiction and attorney-client relationship are still issues in this proceeding, and rulings thereon binding as provided by law. Citing National Union Fire Insurance Co. V. Stites Professional Law Corporation (1991) 235 Cal.App.3d 1718, the court concluded that determination of arbitral jurisdiction is outside the scope of the statutes permitting fee arbitration. The court further concluded that a contractual agreement conferring subject matter jurisdiction is enforceable. The order of the trial court confirming the award was affirmed

Goldstein v. Lees (1975) 46 Cal.App.3d 614

A former general counsel of a corporation sued to recover his fees for services rendered while representing a minority shareholder and director in a proxy fight against the corporation. The Court of Appeal held that the attorney violated then Rule 5 of the Rules of Professional Conduct by acceptance of employment adverse to a former client, and reversed the judgment of the trial court in his favor. The Court stated that "It is settled in California that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility."

Goldstone v. State Bar (1931) 214 Cal. 490

A worker, McGee, was injured in an industrial accident. The Industrial Accident Commission awarded McGee the sum of \$2,547 (payable \$16.98 per week), but he did not know of the award because he failed to give the commission a forwarding address when he moved. McGee eventually went to the attorney (Goldstone) and asked for assistance in obtaining compensation for his injuries. The attorney contacted the commission, learned of the award already made, and took McGee to collect the \$882.96 already payable to McGee. The attorney took 40% of the

amount McGee received for his contingent fee. In a proceeding to discipline Goldstone, the Supreme Court held that his conduct in charging a fee wholly disproportionate to the services performed warranted his suspension for three months. “The conduct of the petitioner in charging a fee so wholly disproportionate to the services performed ... is conduct which cannot be reconciled with that honesty and fair dealing required of an attorney in his relations with his client.... [I]f a fee is charged [that is] so exorbitant and wholly disproportionate to the services performed as to shock the conscience ... such a case warrants disciplinary action by this court.”

Hansen v. Jacobsen (1986) 186 Cal.App.3d 350

In a personal injury case, plaintiffs’ former lawyers who had a contingency fee agreement with plaintiff, filed a notice of lien in the action. The trial court granted plaintiff’s motion to strike the notice of lien on the ground that an independent action for enforcement was required. The Court of Appeal reversed and held that a discharged attorney may file notice of a contractual lien in the pending action. In addition, the Court noted the following, “An attorney does not automatically have a lien upon a judgment for the value of services rendered, but an equitable lien may be created by contract between the attorney and client.” Such a lien may be created either by express contract, as in the present case, or it may be implied if the retainer agreement between the lawyer and client indicates that the former is to look to the judgment for payment of his or her fee. Having entered into a contract creating such a lien, a client still has the absolute power and right to discharge the attorney at any time, with or without cause. When discharge occurs, if a lien exists, it survives, but it is for quantum meruit (i.e., the reasonable value of services rendered), and not for the full contract fee. If the ultimate recovery is insufficient to pay both the discharged and current attorneys, proportional recovery may be appropriate. Because the discharged attorney is not a party to the pending action and may not intervene, the trial court has no jurisdiction to award fees to that attorney. Therefore, even though a contractual lien continues to be viable after discharge, a subsequent, independent action is required to establish the amount of the lien and to enforce it. Despite the requirement that the discharged attorney bring an independent action to establish the amount and enforce the lien, its priority is determined at the time it is created by the original contract, even if the attorney never files notice as a lien claimant. Although it is not necessary to file a notice of lien, it is permissible, and “we hold that a previously discharged attorney may file a notice of lien in a pending action.”

[Note Be alert to special situations (such as minor’s compromises) where a statute confers jurisdiction on the court handling the underlying case to determine and allocate attorneys’ fees. See *Padilla v McClellan* (2001) 93 Cal.App.4th 1100.]

Hawk v. State Bar (1988) 45 Cal.3d 589

An attorney entered into an initial fee agreement with clients whereby he agreed to represent them through trial for a fixed fee. Clients were unable to pay the fixed fee, so the attorney requested that they give him a promissory note secured by a deed of trust with a power of sale on real property which clients owned. Clients thereupon signed the standard form note secured by a deed of trust which the attorney presented to them. The note was payable on demand. The attorney thereafter assigned the note and deed of trust, and the assignee demanded payment. The assignee assigned the note to a third party, who foreclosed. The State Bar disciplined the attorney for violation of then Rule 5- 101 of the Rules of Professional Conduct (“[a] member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the

transaction and terms in which the member ... acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.") The Supreme Court affirmed and held that Rule 5-101 applied to an initial fee agreement which included a note secured by a deed of trust on a client's property. The Supreme Court also noted its general disapproval of fee arrangements which allow an attorney to collect disputed fees without judicial scrutiny, such as by a confession of judgment or a promissory note secured by deed of trust with a power of sale.

Hecht v. Superior Court (1987) 192 Cal.App.3d 560

Plaintiff and defendant operated a business together from their home and shared in the profits. Later on, attorney incorporated this business. Plaintiff was initially listed as a director, an officer and a proposed shareholder. Plaintiff found out later that no shares were ever issued to her, and that all the shares were issued to defendant and his nephew. Plaintiff sued for her interest in the business, and sought to compel attorney to testify about discussions he had with defendant concerning the incorporation of the business. The court held that plaintiff presented sufficient evidence that she had participated as would a partner in the business, was entitled to expect that the nature of her participation would be the same when the business was incorporated, and accordingly was entitled to compel testimony of the attorney as to attorney-client conversations with defendant up to and including the point at which the corporate documents were revised to delete plaintiff's name. Courts may look to the intent and conduct of the parties to determine whether an attorney-client relationship was actually formed.

Hensel v. Cohen (1984) 155 Cal.App.3d 563

Attorneys took client's case under a contingent fee agreement, but later decided that the case was a loser, and so informed client, advising him that they would do no further work and suggesting that he secure new counsel, represent himself or dismiss the case. Client secured new counsel. Attorneys notified new counsel that they would assert their lien rights under the contingency fee agreement and would seek the reasonable value of their services were a recovery obtained. After securing a recovery with the help of new counsel, client brought this declaratory relief action to establish that he owed nothing to his former attorneys. The Court of Appeal agreed with the client. An attorney's withdrawal based on disenchantment with the case represents an abandonment of the client's case, and with it, an abandonment of any right to compensation.

Huang v. Cheng (1998) 66 Cal.App4th 1230

Attorney served the Notice of Client's Right to Arbitrate one day after sending the final bill and before any actual dispute arose. Attorney filed lawsuit two years later. Client answered complaint and later filed a Motion to Dismiss for failure to deliver proper notice. Held, the client's answer to the complaint was not a waiver because Notice of the Client's Right to Arbitrate was never properly given. Held, under B & P Code 6201, the Notice of Client's Right to Arbitrate is effective to commence the statutory deadlines only if it is given after an actual dispute has arisen.

Huskinson & Brown v. Wolf (2004) 32 Cal.4th 453

In this fairly typical referral fee situation, the first attorneys B after investigating a civil case and advancing some costs B referred it to a second attorney who prosecuted it successfully. The attorneys had an oral agreement for a division of fees. Although an agreement between attorneys to divide fees is not enforceable if not in compliance with Rule 2-200 and in particular signed by the client, the attorneys may nonetheless obtain compensation in quantum meruit. This case follows *Chambers v. Kay*, supra. An exception would exist if the attorney has violated a rule that proscribed the very conduct for which compensation was sought, i.e., the rule prohibiting attorneys from engaging in conflicting representation or accepting professional employment adverse to the interests of a client or former client without the written consent of both parties. Instead, the court opined that rule 2-200 does not bar the services plaintiff rendered on [client's] behalf; it simply prohibits the dividing of [client's] fees because she was not provided written disclosure of the fee-sharing agreement and her written consent was not obtained. The court also made clear that the rights (and funds) of the client are not implicated in any way in resolving the dispute between the attorneys.

Hyde v. Midland Credit Management Inc. (9th Cir. 2009) 567 F.3rd 1137.

FEE AWARD AGAINST ATTORNEY IN FRIVOLOUS SUIT: 15 U.S.C. §1692k(a)(3) does not authorize a court to award fees and costs against the attorney representing unsuccessful plaintiff.

At the resolution of a dispute, the court awarded attorney's fees and costs against a plaintiff and his attorneys jointly and severally, finding that the case was frivolous and brought in bad faith. The attorneys, but not the plaintiff, appealed the award. All attorneys agreed that the court erred in awarding attorney's fees under Rule 11 by not following the rule's requirements. No case in the 9th Circuit authorized the assessment of fees and costs against an attorney of an unsuccessful abusive plaintiff under 15 U.S.C. §1692k(a)(3). The statute itself authorizes damages in the form of fees and costs to the defendant where the court finds an action was brought in bad faith and for the purposes of harassment, it does not indicate that the damages can be levied upon the attorney. Upon review, the 9th Circuit determined that the statute does not authorize the assessment of fees and costs against the plaintiff's attorney.

Iverson, Yoakum, Papiano & Hatch y. Berwald (1999) 76 Cal.App.4th 990

A promissory note executed by the client for payment of attorney's fees is subject to compliance of B & P Code 6148. Where the fee contract under which the services were rendered is available for failure to comply with Section 6148, a promissory note based on the same fees is also voidable. After avoidance, the action no longer lies upon the written promissory note and is subject to the two year statute of limitations under C.C.P. 337, the "account stated" must consist of a writing which complied with B&P Code 6148.

Jackson v. Campbell (1932) 215 Cal. 103

An attorney entered into a written contingency agreement to represent a widow in a wrongful death action. One paragraph of the agreement provided that the attorney would receive 35% of the total amount recovered if the matter was prosecuted to judgment. Another paragraph provided that the attorney would receive 35% of the total amount recovered if the case was

appealed. After the wrongful death case was tried to judgment in favor of the widow, a dispute arose as to whether the attorney was entitled to 35% of the recovery, or 70%. The trial court interpreted the agreement as entitling the attorney 35%. The Supreme Court affirmed, opining that had it been contemplated by the parties that the attorney would receive 70% of the recovery, such a provision would have been “so unconscionable as to raise the question of its enforceability.”

Jacuzzi v. Jacuzzi Bros., Incorporated (1963) 218 Cal.App.2d 24

In a stockholders’ derivative action against the corporate defendant alleging that corporate assets were transferred without adequate consideration, plaintiff’s counsel represented the corporation for 24 years prior to the filing of the action. The court held that there was no conflict of interest in the corporation’s former counsel representing the plaintiff since the action was prosecuted for the corporation’s benefit.

“Here the complaint shows this to be a derivative action, brought in behalf of Jacuzzi Bros., Incorporated. Its purpose is to restore to the corporation property and assets alleged to have been improperly transferred for an inadequate consideration. The action is for the benefit of the corporation, Gray’s former employer, and not adverse to it. Respondents, for whom Gray is now acting as attorney, are in effect guardians ad litem and trustees for the corporation. [Citations.] Where, as here, minority shareholders bring an action against the corporation and its directors, seeking redress for alleged misfeasance in office on the part of the directors, a former attorney for the corporation is not disqualified from representing the shareholders in such action unless there is some showing that in so doing the attorney may be called upon to breach a professional confidence previously entrusted to him by his former client. There is no such showing in this case.” (Id, at 28-29.)

Jeffrey v. Pounds (1977) 67 Cal.App.3d 6

Mr. Pounds hired an attorney to represent him after he was injured in a car accident. During the pendency of the personal injury action, Mr. Pounds had marital problems and attempted to work out a settlement with his wife. Upon learning that his attorney’s law firm agreed to represent his wife in the marital dissolution, Mr. Pounds discharged his attorney and refused to pay his fees. The law firm sued Mr. Pounds for its fees. The Court of Appeal reversed the trial court’s award of fees to the law firm, directing it to award only those fees incurred before the conflict arose. “Acts of impropriety inconsistent with the character of the legal profession and incompatible with the faithful discharge of professional duties will prevent an attorney from recovering for his services.” (67 Cal.App.3d 9, citing Clark v. Millsap (1926) 197 Cal. 765, 785 and Goldstein v. Lees (1975) 46 Cal.App.3d 614, 618.)

Joseph E. Di Loreto, Inc. v. O’Neill (1991) 1 Cal.App.4th 149

Defendant retained plaintiff to represent her in a personal injury action under a written contingent fee agreement. After a jury verdict was entered in favor of defendant, plaintiff informed her that under their agreement, a new employment contract would have to be negotiated for continued representation on appeal. Defendant discharged plaintiff and asked for the return of her file. Plaintiff filed a Notice of Attorney’s Lien in the underlying action and, thereafter, defendant, through her new attorney, accepted full payment of the judgment. Plaintiff filed a lawsuit to collect his fees.

In her response, defendant claimed that plaintiff was not entitled to the fees because he had “willfully terminated all contracts” and that he had acted with malicious intent. However, the court found that the fee agreement provided that the attorney was obligated to prosecute a new trial motion, but was not obligated to prosecute an appeal. Accordingly, the court found the attorney could request an additional fee for handling the appeal. Inasmuch as the attorney had fully performed all that was required under the written contract before leaving the case the attorney was entitled to recover the agreed upon fee.

Juodakis v. Wolfrum (1986) 177 Cal.App.3d 587

Client initiated fee arbitration with the State Bar. Before an award was issued, client sued the attorney for malpractice. Upon issuance of the award, the attorney asked the panel to vacate the award, asserting that the client had waived the right to maintain arbitration by filing the malpractice action. The panel never acted on that request, but proceeded to render an award against the attorney. Client thereupon petitioned the Superior Court to confirm the award. The attorney cross-petitioned to vacate the award.

The Superior Court vacated the arbitration award on the grounds that the client had waived the right to maintain fee arbitration by filing a malpractice action against the attorney.

On appeal, the client first asserted that his “waiver” was a question of fact, one on which the trial court had no evidence to permit it to conclude that a waiver had occurred. The Court of Appeal noted that factual evidence of waiver must ordinarily be present before a party will be deemed to have waived a right to arbitrate when the right derives from a contract, but concluded that the standard for waiving a contractual right to arbitration was inapplicable, because here both the right to arbitration and the standard for its waiver are defined by statute. The apparent import of this holding is that a waiver under B&P Code section 6201 is absolute and not dependent on the knowledge or intent that must ordinarily be present to establish a waiver in other contexts.

Client then relied on *Manatt, Phelps, Rothenberg & Tunney v. Lawrence* (1986) 151 Cal.App.3d 1165, for the proposition that filing the malpractice action would not prevent the fee arbitration from going forward. (In *Manatt*, the client after having initiated arbitration, sought to extract itself by suing for malpractice and then seeking to terminate arbitration on the grounds that the filing of the malpractice action resulted in “waiver” of the right to maintain the arbitration, and ousted the arbitrators of jurisdiction to proceed. The *Manatt* court rejected this contention and confirmed the arbitrators’ award.)

The Court of Appeal rejected this argument as well, holding that the client could not take advantage of his own “waiver,” because to allow him to do so would grant him, in the words of the *Manatt* court, “a free pass out of binding arbitration.” (177 Cal.App.3d at 592.) Unlike *Manatt*, the waiver here was asserted, not by the party whose conduct created the waiver, but by opposite party, the attorney, for whose benefit the waiver provision operates.

This case validates the central theme of *Manatt* that one may not take advantage of one’s own waiver.

Karton v. Segreto, (2009) 176 Cal. App. 4th 1.

Corrections and Amendments of Arbitration Awards: A court may only “correct” an arbitration award for an evident miscalculation of figures, and not to add additional remedies. On application for review of an arbitration award, the court must either confirm the award, correct and confirm it, vacate the award, or dismiss the proceeding. It has no other jurisdiction with respect to the award.

Attorney Karton and client Segreto went to non-binding MFAA arbitration on a fee dispute. The arbitrators issued an award to Karton, did not include prejudgment interest, as Karton demanded. After the 30 day period for demand for trial de novo expired, Karton petitioned the court to correct the award to include prejudgment interest. The petition was denied because the modification sought was beyond the possible on a petition to correct under CCP §1286.6. That statute only allows a correction of an arbitration decision where there is “an evident miscalculation of figures.” Karton instead sought additional remedies in the form of prejudgment interest and compensation for additional fees and costs, which is not correctable. Karton then sought (and obtained) from the arbitrators an amendment to the award to include the additional amounts sought. Segreto filed a request for a trial de novo from the modified award, and further sought attorney’s fees as the prevailing party on Karton’s petition to correct and confirm the award.

The Court of Appeal held that the trial court, upon concluding that the award was not correctable, was required to confirm the award and entered judgment, which would have precluded Karton from returning to the arbitrators to amend the award. The court found that pursuant to CCP §1286, the trial court has only four choices after an arbitration award: (i) confirm the award as made, (ii) correct the award and confirm it, (iii) vacate the award or (iv) dismiss the proceeding. Thus court thus set aside the amended award, because the arbitrators should not have been given that opportunity where the petition for correction had been denied.

The court also considered when arbitrators must receive and resolve post-award requests for modification. CCP §1284 establishes that *corrections* must be received and resolved on the same bases as a trial court: requests must be received within 10 days, and corrections issued within 30 days, after service of the award. Section 1284 does not specify, however, whether *amendments* to awards (rather than corrections), fall along the same time limits as corrections, or whether amendments may be made any time before a trial court affirms the award. There is a split of authority on this point. Compare, *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 881 and fn 25 (10/30 day rule) and *Delaney v. Dahl*, (2002) 99 Cal.App.4th 647, 650, 659 and Committee on Mandatory Fee Arbitration of the State Bar of California Arbitration Advisory 03-02 (amendments may be issued any time before confirmation). The *Karton* court appears to agree with *Delaney*. Id. at fn 14.

Katz v. Workers’ Comp. Appeals Bd. (1981) 30 Cal.3d 353

Citing then Rule 8-101 and *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 163-164, the California Supreme Court in this case noted in dictum that “[w]hether the Rules of Professional Conduct require an attorney to deposit advance fees from clients in a trust account is an unanswered question in California.”

Kerr v. Screen Extras Guild, Inc. (9th Cir. 1976) 526 F.2d 67, cert. den. 425 U.S. 951

In appropriate cases, the “presumptively reasonable” lodestar figure for an attorney fees award is adjusted upward or downward, based upon the following factors provided they have not already been subsumed in the lodestar calculation

1. the time and labor required;
2. the novelty and difficulty of the questions;
3. the skill requisite to perform the legal services properly;
4. the preclusion of other employment due to acceptance of the case;
5. the customary fee;
6. the contingent or fixed nature of the fee;
7. the limitations imposed by the client or the case;
8. the amount involved and the results obtained;
9. the experience, reputation, and ability of the attorneys;
10. the undesirability of the case;
11. the nature of the professional relationship with the client;
12. awards in similar cases.

Kroff v. Larson (1985) 167 Cal.App.3d 857

Client discharged attorney, who had been working under a contingent fee agreement. The agreement provided that costs advanced by the attorney would be reimbursed to him out of any recovery. While the case was still pending and before any recovery had been obtained, attorney sought reimbursement for the costs he had advanced. The court held that as a general proposition of law, under a contingent fee contract, a claim for costs, like a claim for the reasonable value of one’s services, does not mature until there is a recovery.

Kurini v. Hanna and Morton (1997) 55 Cal.App.4th 853

The Court of Appeal affirmed the trial court’s granting of summary judgment in favor of a law firm on its cross-complaint against a former client for attorney fees. The trial court granted the motion based at least in part upon the former client’s application for an award of attorney fees in the underlying action, in which the former client “vouched for the fact that the fees were reasonable and that he was legally obligated to pay the fees”. The Court of Appeal held that this was a “judicial admission which is binding and dispositive without further evidence.” It did note, however, that the trial court had the discretion to disregard the judicial admission.

Lawrence v. Walzer & Gabrielson (1989) 207 Cal.App.3d 1501

Client sued attorney for legal malpractice. Attorney petitioned to compel arbitration based on an arbitration clause in their fee agreement which dealt almost exclusively with financial matters. Client opposed arbitration, claiming that she had not understood she was waiving her right to a jury trial in a legal malpractice action and would not have signed the retainer agreement if she had known she was agreeing to submit future legal malpractice claims to arbitration. The Court of Appeal affirmed the trial court’s denial of attorney’s petition to compel arbitration, finding the arbitration provision to be ambiguous to the extent of its applicability to legal malpractice claims, as opposed to fee disputes. Faced with this ambiguity, the Court construed the arbitration clause as applying only to fee disputes and not to legal malpractice claims.

Lee v Hanley (2015) 61 Cal.4th 1225

Client advanced Attorney funds to cover attorney's fees in litigation. After Client terminated the representation, Attorney refused to return the unearned attorney's fees and Client filed suit to recover the unearned fees. Attorney demurred on the ground that the lawsuit was barred by C.C.P. §340.6(a), which sets forth a one-year limitations period for actions against an attorney for a "wrongful act or omission" arising in the performance of "professional services." The trial court sustained the demurrer, concluding that section 340.6(a) applied to Client's claims and that she filed her complaint more than one year after Attorney informed her that he would not return her money. The Court of Appeals reversed the trial court's order sustaining Attorney's demurrer. The Supreme Court affirmed, holding (1) section 340.6(a) applies to a claim when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services; and (2) in this case, Client's complaint could be construed to allege a claim for conversion whose ultimate proof at trial may not depend on the assertion that Attorney violated a professional obligation.

Levin v. Graham & James (1995) 37 Cal.App.4th 798, rev. den. 11/16/95

The applicable statute of limitations for any action by a client against an attorney for "any wrongful act or omission of an attorney arising in the performance of professional services ... other than actual fraud, whether the theory of liability is based on the breach of an oral or written contract, a tort, or a breach of a fiduciary duty", is C.C.P. section 340.6, which generally imposes a one year period within which to sue, subject to various tolling provisions.

Levin v. Gulf Ins. Group. (1999) 69 Cal.App.4th 1282

An insurer and the attorneys retained to defend the insureds are liable for intentional interference with prospective economic advantage of a discharged attorney when, after receiving a notice of lien for attorney fees and cost filed in a case by a discharged attorney, they pay his or her former client and the latter's new attorney in settlement or in satisfaction of a judgment with knowledge of the lien.

Levy v. Toyota Motor Sales (1992) 4 Cal.App.4th 807

Plaintiff won a jury verdict for \$17,619.52, which was the purchase price she paid for a defective automobile, plus \$5,000 in statutory penalty, in a lawsuit against the seller of the automobile. California's "Lemon Law", under which plaintiff sued, provides that the court shall allow recovery of "attorney's fees ... reasonably incurred by the buyer in connection with the commencement and prosecution of such action." Plaintiff then sought over \$137,459 as attorney fees. Defendant objected, claiming that reasonable attorney fees should be not more than \$20,000, because the fees were "unconscionable, unreasonably incurred, based on unrealistic billing rates, and inflated by improper application of the "private attorney general" theory. Plaintiff appealed from the trial court award of \$30,000 in attorney fees. The Court of Appeal held that the trial court did not abuse its discretion in awarding only \$30,000 of the \$137,459 which plaintiff requested. It noted that "[o]ur case did not involve a contingency fee arrangement", suggesting that it would have been unreasonable for plaintiff to obligate himself to pay \$137,459 in attorney to pursue a claim with a maximum recovery of less than \$23,000, exclusive of attorney fees.

Loeb & Loeb v. Beverly Glen Music (1985) 166 Cal.App.3d 1110

Pendency of fee arbitration does not prevent a party from seeking relief from the automatic stay of B&P Code section 6201(c) in order to prosecute an application for a writ of attachment. The court noted that nothing in the law authorizes the arbitrators to issue a writ of attachment, and the attachment statute expressly provides that the issuance of a writ has no bearing on the merits of the underlying case.

Loeb v Record 162 Cal.App 4th 431 (2008)

Underlying PI case settlement deposited with the court, attorney had previously withdrawn as unable to work with client, but filed lien for his fees. Client who sought fee arbitration, did not properly seek trial de novo (he filed motion in the underlying PI case); prevailing attorney requested court in PI case distribute arbitration fee award (but did not seek confirmation of the Findings and Award). Court of Appeals holds both client and attorney were wrong. Client needed to seek trial de novo within 30 days, either by filing a new case or in an existing case in which the attorney was a party, and client didn't. Relative to the order to pay attorney fees, without confirmation of Findings and Award the PI court had no power to order distribution of the deposited funds. Court attempted to restore parties to positions prior to court granting erroneous order and permitted to attorney to seek confirmation of Findings and Award.

Macomber v. State of California (1967) 250 Cal.App.2d 391

A contractor sued the State for additional work done on a job. Although plaintiff made known his total cost to the State before suit was filed, the details of the cost breakdown involved could only be determined after cross-examination at trial. The court held that plaintiff was only entitled to reasonable value of the extra work done which could only be ascertained by the trial court after a consideration of the conflicting evidence. Therefore, the claim sued on was unliquidated and plaintiff was not entitled to prejudgment interest under Civil Code section 3287.

Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal.App.3d 1165

After having initiated arbitration and obtained a stay of the attorney's lawsuit in superior court, clients sought to extract themselves from the arbitration by filing an answer and cross-complaint for malpractice in the court action, and then seeking to terminate arbitration on the grounds that the filing of the cross-complaint waived the right to maintain the arbitration, and ousted the arbitrators of jurisdiction to proceed. The arbitration proceeded without the clients' further participation, and an award was entered. The Court confirmed the award, and held that the arbitrators had authority to decide whether they continued to have jurisdiction after clients filed their answer and cross-complaint, and the arbitrator's refusal to recognize a "waiver" would be affirmed, under the standard of review allowing appellate interference only when the arbitrators' decision is "completely irrational." In rejecting clients' claim of "waiver", the Court noted that waiver was being invoked as an affirmative right by the waiving party itself, to avoid its agreement to arbitrate. Such a state of affairs, the Court held, was "the converse of the normal" for claims of waiver, which are ordinarily asserted by the opposing party in order to avoid

arbitration. Applying “close scrutiny” to the waiver claim, the Court observed that to sustain the clients’ position would be to allow them “a free pass out of binding arbitration.”

[This was the first reported appellate opinion construing the mandatory fee arbitration statutes. The Court held that the policy behind the mandatory fee arbitration statutes is to alleviate the disparity in bargaining power in attorney-client fee disputes.]

Margolin v. Regional Planning Commission (1982) 134 Cal.App.3d 999

In determining reasonable fees, the amount of fees awarded the attorney in other cases are relevant. The fact that no time records were kept is not fatal when hours worked on by counsel were attested to by the attorney under oath. The problem then becomes one of fact finding. However, the cost to the attorney of providing services is not relevant to a determination of their value.

Marina Glencoe v. New Sentimental Film 168 Cal.App 4th 874 (2008)

Where plaintiff dismissed case, with agreement of defendant, upon settlement (but no valid 998 offer from defendant), prior to summary judgment or trial at trial, there is no prevailing party. Court has no authority to award fees to prevailing party, as there was none.

Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal.App.3d 991

Plaintiff submitted invoices to defendant for repairs made. These invoices included some inapplicable charges. Defendant disputed liability but at no time prior to trial disputed the amount or method of calculating plaintiff’s damages. The court held that minor errors in the calculations did not mean that the damages were not capable of being made certain by calculation and that plaintiff was entitled to prejudgment interest.

Mark v. Spencer 166 Cal.App 4th 219 (2008)

Agreement to divide fees (fee split) in class action suit must be disclosed to court (as required by California Rules of Court, rule 3.769, or is not enforceable

Martinez v. Master Protection Corporation (2004) 118 Cal.App.4th 107

An employment arbitration agreement was voided as procedurally and substantively unconscionable, permeated with illegality, and unenforceable. The agreement had provided that arbitration was to be held before the American Arbitration Association which refused to accept the dispute because the arbitration agreement violated the standards of AAA. The Court, in addition to voiding the agreement, also determined that the court had no jurisdiction to designate an alternate arbitral forum when the one specified in the agreement refused to accept the case. (See also Alan v. Superior Court (UBS Painewebber) (2003) 111 Cal.App.4th 217, requiring civil trial in NYSE/NASD cases since securities industry regulatory agencies refuse to comply with California’s ethical disclosure standards for arbitrators.)

Martino v. Denevi (1986) 182 Cal.App.3d 553

In an action for dissolution of a partnership, the trial court entered judgment for defendant, and awarded defendant \$40,000 in attorney fees (presumably under Civil Code section 1717.) The Court of Appeal affirmed the judgment, except as to the award of attorney fees. Under the Rules of Professional Conduct, “no attorney may charge or collect an unconscionable fee. Reasonableness of the fee is determined by looking to a variety of factors “the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney’s efforts, his learning, his age, and his experience in the particular type of work demanded [citation]; the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. [Citations.]” The Court pointed out that “[t]he only evidence presented in support of the motion for attorney fees was the attorney’s request for a flat fee for ‘services rendered.’ No documents, such as billing or time records, were submitted to the court, nor was an attempt made to explain, in more than general terms, the extent of services rendered to client.” The Court held that “[t]his ‘evidence’ is not sufficient to support the award of \$40,000 in attorney fees”, and remanded the case for a rehearing of the attorney fees issue.

Mason v. Levy & Van Bourg (1978) 77 Cal.App.3d 60

Plaintiff, a lawyer, referred two contingent fee cases to defendant law firm, in exchange for defendant’s promise to pay plaintiff a share of their contingent fee. Defendant was not diligent in prosecuting the cases, and no recovery was obtained. Plaintiff sued the law firm for what he believed he would have recovered as his share of the contingent fee had defendant handled the case competently. The suit was premised on the contention that a promise to pursue a recovery with reasonable diligence was necessarily implied in the referral and fee-splitting contract. The court declined to read such a provision into the contract, concluding that to do so would compromise defendant’s duty of undivided loyalty to its client.

Matthew v. State Bar (1989) 49 Cal.3d 784

An attorney was disciplined for, among other things, failure to refund unearned fees, even though the fee agreements in question characterized the retainer paid as “nonrefundable.” The Supreme Court emphasized that “retention of unearned fees [is] serious misconduct warranting periods of actual suspension, and in cases of habitual misconduct, disbarment.”

Mayhew v. Benninghoff (1997) 53 Cal.App.4th 1365

An arbitration provision in a retainer agreement between an attorney and client providing for arbitration of “any controversy arising out of or related to [the attorney’s] engagement for legal matters” did not cover unrelated business dealings. Even if it did, the Court held, the attorney was obligated to comply with Rules of Professional Conduct Rule 3-300 governing the duties of an attorney who enters into business transactions with clients, and there was no evidence that he complied with the Rule.

McAvoy v. Lerer, Inc. (1995) 35 Cal.App.4th 1128

A non-binding award was served in a State Bar fee arbitration matter and on a Monday, 32 days later, defendants filed an action in superior court seeking a trial after arbitration. Plaintiff filed a petition to confirm the arbitration award arguing that the award became binding on Saturday, 30

days after it was issued. The trial court granted the petition to confirm. The Court of Appeal reversed, finding that the request for a trial after arbitration was timely because the time for filing a request for a new trial had been extended by C.C.P. section 12a. (Under section 12a, the last day for performing an act is extended if that day falls on a holiday. A holiday is defined to include “all day on Saturdays” and “every Sunday.”)

Meehan v. Hopps (1956) 144 Cal.App.2d 284

The fact that an attorney undertakes to represent a corporation does not, of itself, give rise to an attorney-client relationship with each of the officers of the corporation.

Meis and Waite v. Parr (N.D.Cal. 1987) 654 F.Supp. 867

Plaintiff, a law partnership, notified defendants of their right to request arbitration of a fee dispute. After defendants requested arbitration, plaintiff filed a federal court action which the court stayed pending the arbitrators’ decision. Following a rejection of the arbitration award by the defendants, the plaintiff filed motions for summary judgment, default, default judgment and writ of attachment. The court found that by filing the action while the arbitration was pending, the plaintiff violated the intent of B&P Code section 6200 et seq. by pursuing arbitration and litigation simultaneously and that by doing so, plaintiff violated “the statutes’ policy of providing the client with an ‘effective inexpensive remedy...which does not necessitate the hiring of a second attorney.’” (Defendants had hired another attorney to file a motion for a stay of the civil proceeding.) The court dismissed the plaintiff’s action without prejudice. The court, believing that the rejection of the arbitration award resulted from the then existence of plaintiff’s federal action, extended the time period for either side to request a trial after arbitration.

Meister v. Regents of University of California (1998) 67 Cal. App.4th 437

It is within the trial court’s discretion in utilizing the “lodestar method” for calculating a statutory award of attorneys’ fees to disallow hours spent after an early settlement offer if it appears that the plaintiff could have obtained all of his ultimate relief by accepting that offer. In such a situation, the time incurred would not be deemed “reasonably spent.” Similarly, where a fee request seems unreasonably inflated, the time-spent litigating the attorney fee request would not be deemed “reasonably spent.” Finally, time spent opposing a post-trial motion to seal the record was not recoverable when it was not necessary to secure the result obtained in litigation. (Note The 1st District Court of Appeals declined to follow Meister in *Greene v. Dillingham Construction, N.A., Inc* (2002) 101 Cal.App4th 418 The Green court held that disallowing attorney’s fees incurred after a settlement offer was rejected, which the Meister court had approved, was improper unless the offer had been made pursuant to CCP 998. The Supreme Court has apparently done nothing to reconcile the two districts.)

Miller v Campbell, Warburton, et al 162 Cal.App 4th 1331 (2008)

Attorney fees for services to the Executor (in his or her personal role), not in the representative role as Executor, are matters which are not included in a probate judgment for fees for representing the Executor (personal representative). Fees had been incurred in defense of the Executor personally, not as to her representative role.

Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1

(a) Arbitrators May Base Their Decisions Upon Principles of Justice and Equity

“Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. ‘[Citations.] As early as 1852, this court recognized that, ‘The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award ex equo et bono [according to what is just and good].’”

(b) Arbitrator’s Award Subject to Limited Challenge

“[A]n award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction). Further, the existence of an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review.”

(c) Except When Illegality of the Contract Is Claimed

“[T]he rules which give finality to the arbitrator’s determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator’s award.”

Moore v. Conliffe (1994) 17 Cal. 4th 1682

A physician testified in a private arbitration of a wrongful death claim that the sudden death of the patient was not caused by the use of a particular drug administered by Kaiser Foundation Hospitals. The arbitration award was adverse to the plaintiff. Plaintiff found out later that the doctor had, three months before he testified at the arbitration, contributed an article to a medical journal in which he cited the patient’s case as an example of death caused by the drug. The family sued the physician in superior court on a fraudulent concealment theory. The physician successfully demurred based on the argument that his conduct and testimony were privileged under Civil Code section 47. The family appealed. The Supreme Court affirmed, stating “... we conclude that statements made in the course of a private contractual arbitration proceeding are protected by the litigation privilege embodied in section 47(b)(2).”

National Union Fire Insurance Company of Pittsburgh, PA v. Stites Prof. Law Corp. (1991) 235 Cal.App.3d 1718

Attorney was hired to represent certain insured under an officers and director’ policy, as “Cumis” counsel. (Under *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, an insurer must provide independent counsel when it reserves its rights to deny coverage. Such independent counsel is referred to as “Cumis” counsel.) Later on, the insurer disputed the fees charged by attorney, and initiated fee arbitration under B&P Code section 6200 et seq. Attorney refused to participate in the arbitration and the arbitrators found in favor of the insurer. Insurer then petitioned for the court to confirm the arbitrator’s award. The court held that due to the insured’s reservation of rights on the coverage issue as to the insured,

the attorney represented only the insured, and did not represent the insurer. Since the fee arbitration statute applies to “disputes between attorneys and their clients to whom they have rendered professional services”, the court concluded that the insurer did not have the power to compel defendant to arbitrate under the statute. The court also held that even though attorney did not raise the issue of the arbitrator’s jurisdiction at the time of the arbitration hearing, the trial court had the authority to determine whether the arbitrator’s award was improper because it was not authorized by section 6200 et seq.

Neaman v. Kaiser Foundation Hospital (1992) 9 Cal.App.4th 1170, mod. 11 Cal.App.4th 293

Plaintiffs filed an action against Kaiser Foundation Hospital for medical malpractice. The action was stayed and the matter was submitted to binding arbitration before three arbitrators as provided in the agreement with Kaiser. One of the arbitrators was a neutral (the “neutral arbitrator”) chosen by the other two arbitrators who had been selected by the parties (the “party arbitrators.”) An award issued in favor of Kaiser and plaintiffs moved to vacate after they discovered that the neutral arbitrator had previously acted as a party arbitrator selected by Kaiser, but failed to disclose that fact. The court reversed and remanded with directions to vacate the award and to order a new hearing before new arbitrators. The court found that the neutral arbitrator’s prior relationship with Kaiser as its party arbitrator was a substantial business relationship that should have been fully disclosed.

Nightingale v. Hyundai Motor America (1994) 31 Cal.App.4th 99

The buyer of an automobile prevailed in her lawsuit against the dealer for various causes of action under California’s “Lemon Law” (the Song-Beverly Consumer Warranty Act, Civil Code 1790 et seq.) The trial court awarded her attorney fees pursuant to section 1794(d), which allows the prevailing buyer to recover attorney fees that have been “reasonably incurred.” Defendant appealed from the portion of the judgment awarding attorney fees, maintaining that “the billing statements submitted by [the buyer] to the trial court in connection with the motion for attorney fees ‘are classic block billings’ which make it impossible to accurately assess whether the claimed time was actually expended.” The Court of Appeal agreed the billing statements did not break down the time spent on each task performed, but dismissed this argument, observing that “the time slips which were also submitted to the court do provide this information,” and, even if they were not part of the record, the trial court clearly was in a position to assess if the tasks described reasonably required the time recorded and the court did so. [Note this is a consumer protection case. It was a mixed hourly/contingent fee case. Fee reduced from \$113k to\$75k]

Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal.App.4th 1

Plaintiff in a medical malpractice case entered into a contract with a “medical legal consulting firm” to pay a contingent fee of 20% of the recovery for the firm’s assistance in reviewing medical records and locating expert witnesses. There was a separate contingency fee agreement with plaintiff’s lawyers. After the case settled, the trial court granted the application for fees by plaintiff’s attorneys, but found the contract with the medical legal consulting firm to be unlawful, violative of state law regulating the practice of law and contrary to public policy, and denied it any fee recovery. The Court of Appeal reversed with directions to determine the maximum costs and fees for which plaintiff might be liable and then to allocate the amount between the

consulting firm and the attorneys. The Court of Appeal explained that the consulting firm's involvement did not alter the fact that the total amount paid by plaintiff must equal or be less than the limits on fees and costs in medical malpractice actions contained in B&P Code section 6146. It expressed concern that the consulting firm might have performed work normally done by the lawyer for which he/she would receive compensation through the contingent fee, thereby subverting the legislative scheme.

Olney v. Sacramento County Bar Assn. (1989) 212 Cal.App.3d 807

Plaintiff asserted that defendant bar association and the arbitrator it appointed to arbitrate a fee dispute were liable for fraud and related claims arising out of the conduct of the arbitration. The Court of Appeal held that the action was barred by the immunity provisions of B&P Code section 6200(e), and that the immunity covered both the arbitrator and the sponsoring bar association.

Olsen v. Harbison (Dec. 2010) 191 Cal. App.4th 325

FEE SHARING; REFERRAL FEES; QUANTUM MERUIT

This case involved a dispute between two attorneys regarding the division of fees arising from a personal injury action. The client, retained attorney Olsen to file a personal injury action on her behalf. Olsen subsequently decided to associate attorney Harbison to assist in the case. Olsen and Harbison entered into a fee sharing agreement that was approved by the client in compliance with Rule of Professional Conduct 2-200. A few weeks later, the client fired Olsen and entered into a new fee agreement with Harbison. The case ultimately settled for \$775,000, but Olsen did not receive any fees for his services but did not sue his former client. Instead, Olsen filed suit against Harbison asserting claims for *quantum meruit*, breach of contract, fraud and deceit, intentional interference with contractual relationship and imposition of constructive trust. The trial court entered judgment in favor of Harbison and Olsen appealed. The Court of Appeal affirmed. The court held that the fee sharing agreement was extinguished when the client fired Olsen. The court further held that there was no basis for a *quantum meruit* against Harbison since the client had consented to the fee division. The court held that the *quantum meruit* recovery had to be obtained through a suit against the client. The Court of Appeal distinguished cases such as *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453 (2004) which authorized *quantum meruit* claims against former co-counsel, because in *Huskinson* the client's consent to the association of co-counsel had never been obtained. The court held that because of Olsen's compliance with Rule 2-200, he did not have any equitable remedy against Harbison.

Pacific Law Group U.S.A. v. Gibson (1992) 6 Cal.App.4th 577

Pacific Law Group sued Interact and Gibson, its president, for payment for legal services performed. Clients requested arbitration through the San Mateo County Bar Fee Arbitration Program and both sides agreed to binding arbitration. The arbitrators awarded Pacific Law Group fees of \$33,000 against Interact, held that Gibson was not individually responsible for such fees, and awarded Gibson his costs for the arbitration. Pacific Law Group thereupon paid Gibson the amount of costs awarded by the arbitrator. Interact and Gibson then petitioned to confirm the award in its entirety. The award was confirmed by the superior court which also awarded Gibson and Interact their legal fees and costs expended in confirming the award. Pacific Law Group argued on appeal that only "plaintiff's" awards could be confirmed and then

only when they have not been satisfied. It also argued that confirmation is only available in non-binding arbitrations and that language in an informational brochure issued by San Mateo indicated that confirmation could take place if money was owed. The Court of Appeal disagreed. It held that C.C.P. section 1285 unequivocally stated that “any” party may petition to confirm an award, and all awards are subject to confirmation, including “defense” awards. The right to confirmation was not limited to non-binding awards. The court rejected the argument based on the brochure as “sophistry” and held that under the facts presented, confirmation was mandatory and awarded Gibson his attorneys fees for the appeal as well as the confirmation.

Parada v. Superior Court, (2009) 176 CA4th 1554

ENFORCEABILITY OF ARBITRATION: Unreasonably high arbitration fee for contractual fee arbitration may be unconscionable and render the arbitration provision unenforceable.

Arbitration agreement required three-member panel from JAMS and prohibited consolidation or joinder of claims. The agreement required JAMS arbitration rules, which among other rules required that the parties to deposit the fees and expenses for arbitration before the hearing, and provide that if a party fails to deposit his or her pro rata or agreed-upon share of fees and expenses, the arbitrator may preclude that party from presenting evidence of an affirmative claim at the hearing. Petitioner sued respondent in court and sought to avoid arbitration because these requirements set forth in the arbitration agreement were unconscionable.

The court of appeal found the arbitration agreement procedurally unconscionable because, while the plaintiffs were able read the contract, they could not be reasonably expected to understand the fee rates of a JAMS three arbitrator panel, since the fees were not forth in the agreements. Further, they could not be expected not know the JAMS rules, or that their claims could not be joined with others in a single proceeding, since the JAMS rules were not attached to the agreement. The court also noted that there did not appear to be a reasonable need for 3 person panel or the prohibition on claim joinder, other than to make the arbitration more expensive for plaintiffs.

*The court devoted a substantial portion of its discussion concerning substantive unconscionability to the now disfavored holding in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (see, *Stolt-Nielsen v. AnimalFeeds International Corp.*, 559 U.S. ____ (April 27, 2010)). However, because the court found procedural unconscionability as well as substantive unconscionability, the *Parada* holding appears to continue to be good law.

Parker v. Maier Brewing Co. (1960) 180 Cal.App.2d 630

Where there is no express contract and the action is in quantum meruit to recover the reasonable value of services rendered, prejudgment interest is not recoverable.

Passante v. McWilliams (1997) 53 Cal.App.4th 1240

Counsel arranged a loan for its fledgling corporate client in need of capital. A grateful board of directors promised to give the attorney 3% of the company’s stock. Five years later, the value of 3% of the company’s stock soared to \$33 million, and the company reneged on its promise. The

attorney sued for breach of contract and the jury found for the attorney. The trial court granted the defendant a judgment notwithstanding the verdict, on the ground that the company's promise was unenforceable. The Court of Appeal held that if the promise was bargained for, it was in violation of the attorney's ethical obligations since "there is an inherent conflict of interest created by any situation in which the corporate attorney for a fledgling company in need of capital accepts stock in reward for past services", and there was no evidence of compliance with Rules of Professional Conduct rule 3-300 (which forbids an attorney from entering into a business transaction with a client without, among other things, first advising the client in writing that the client may seek the advice of independent counsel.) The Court of Appeal noted that if the promise was not bargained for, then it was gratuitous and legally unenforceable (regardless of moral issues). Here, the court concluded it was not bargained for.

People ex rel Department of Transportation v. Yuki (1995) 31 Cal.App.4th 1754

In an eminent domain case by the State of California, the jury awarded the property owners \$1,746,337 more than the State's final offer. Pursuant to C.C.P. section 1250.410 which authorizes the court to award litigation expenses including reasonable attorney fees if the State's offer was unreasonable, the trial court awarded the property owners \$1,303,714.30 in attorney fees based on their 40% contingency fee contract with their counsel. The Court of Appeal remanded for re-determination of the reasonable attorney fees, rejecting property owners' argument that the fee award should be at least equal to the contingency fee which they contracted to pay their attorney. The Court distinguished the reasonableness of the fee from the client's perspective (i.e., the reasonableness of the 40% contingency fee), from the reasonableness of a fee award against the State in the condemnation action. In other words, while it may be reasonable for the property owners to pay their attorney a 40% contingency fee, the same 40% amount may exceed what is a reasonable fee award against the opposing party in the underlying condemnation action.

Perez v Grajales 169 Cal App 4th 580 (2008)

When trial de novo was dismissed, the thirty days to apply for a trial de novo having expired, the Findings and Award became binding.

Perlmutter v. Alexander (1979) 97 Cal.App.3d Supp. 16

Attorney represented client on a contingent fee basis and secured a settlement offer. After accepting the offer, Client refused to consummate the settlement. Judging client's conduct to be unreasonable, attorney sought and received court permission to withdraw from the case. When the client later settled the case, the attorney brought this action to recover the reasonable value of his services. The Appellate Department, viewing attorney's withdrawal as justified, allowed recovery. This case was brought as tortious interference (second attorney and client refused to pay lien of first attorney.)

Plummer v. Day/Eisenberg, LLP (2010) 184 Cal. App.4th 38

LIENS-CONTINGENT FEE AGREEMENTS

In *Fletcher v. Davis* (2004) 33 Cal.4th 61, the California Supreme Court held that an attorney retained on an hourly fee basis must comply with Rule of Professional Conduct 3-300 if the fee agreement includes a lien to secure the attorney's fees. However, the Supreme Court in *Fletcher* declined to decide whether Rule 3-300 applies to a contingency-fee arrangement coupled with a lien on the client's prospective recovery in the same proceeding. In this case, *Plummer v. Day/Eisenberg*, the Fourth District Court of Appeal addressed that open question.

In *Plummer*, Plummer brought an action against Day/Eisenberg for conversion and interference with prospective economic advantage. Plummer had agreed to represent the plaintiffs in an underlying personal injury action. Plummer orally agreed with another firm that he would act as counsel while the other firm would finance the litigation and the fee would be split 50/50. The clients executed a two-page retainer agreement by which they "acknowledged that Plummer would be working on their case, that Plummer would be receiving 50% of the total fees, and granted which granted Plummer an independent lien on their recovery to secure those fees. In 2004, Plummer was forced out of the case by the other firm after he had worked on it for over a year. Plummer notified defense counsel in the underlying case about his lien and asked to be named a payee on any settlement check. In May 2006, defense counsel told Plummer the case was settling for \$1 million. Plummer later contacted defense counsel, who stated the settlement check named Plummer as a payee and had been sent to Day/Eisenberg. Allegedly, Day/Eisenberg either "forged" Plummer's endorsement on the settlement check or otherwise "wrongfully negotiated" it to retain all of the attorney fees, despite their knowledge of his lien. Plummer sued Day/Eisenberg for conversion and interference with prospective economic advantage. The trial court granted summary judgment for Day/Eisenberg, holding that Plummer had no direct contractual relationship with the clients and thus lacked an immediate right to possess the settlement funds. Plummer appealed and the Court of Appeal reversed and remanded, holding that there were triable issues as to whether Plummer had an immediate right to possess the settlement funds through an attorney's lien. The court of appeal cited to and adopted the reasoning of COPRAC in formal ethics opinion (State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 2006-170) that "[t]he inclusion of a charging lien in the initial contingency fee agreement does not create an 'adverse interest' to the client within the meaning of Rule 3-300 " and therefore is not subject to the *Fletcher* requirement.

Pollack v. Lytle (1981) 120 Cal.App.3d 931

Attorney Pollack associated attorney Lytle as co-counsel in a medical malpractice case in which Pollack represented the plaintiff on a contingent fee. Pollack was allegedly induced to associate Lytle because Lytle represented that he could secure the services of a certain neurosurgeon to testify as an expert witness, after Pollack had been unsuccessful in his search for such an expert. As co-counsel, Lytle attended the deposition of the neurosurgeon. He reported to Pollack that the doctor had testified beautifully for plaintiff's case, when in fact there were fatal gaps in the doctor's testimony. According to Pollack, in the midst of trial, Lytle induced the client to discharge Pollack and hire him instead. Lytle then proceeded to botch the examination of his neurosurgeon, resulting in no recovery. Pollack sued Lytle for the reasonable value of his services as well as for breach of fiduciary duty and fraud. The trial court sustained a demurrer without leave to amend. The Court of Appeal affirmed as to the causes of action for reasonable value of Pollack's services. It reasoned that Pollack could not sue for the value of his services because such a claim was rooted in the contingent fee contract with the client. Since there was no recovery under that contract, the contingency did not occur and thus, Pollack could not demonstrate that any breach proximately caused any measurable injury. (This case has been

negatively cited many times for concept of fiduciary duty to co-counsel issue, but not directly overruled. See Beck v Wecht, (2002) 28 Cal.4th 289 . Use with caution.)

Powers v. Dickson, Carlson & Campillo (1997) 54 Cal.App.4th 1102

Plaintiffs sued their former attorneys for malpractice arising out of an underlying construction defects lawsuit. The attorneys petitioned the superior court for an order compelling arbitration on the basis of the following arbitration clause in their fee agreement

“If any dispute arises out of, or related to, a claimed breach of this agreement, the professional services rendered by Toghia, or Client’s failure to pay fees for professional services and other expenses specified, or any other disagreement of any nature, type or description regardless of the facts or the legal theories which may be involved, such dispute shall be resolved by arbitration before the American Arbitration Association by a single arbitrator in accordance with the Commercial Rules of the American Arbitration [Association] in effect [at] the time the proceeding is initiated. The hearing shall be held in the Los Angeles offices of the American Arbitration Association and each side shall bear his/their own costs and attorney fees.”

The Court of Appeal reversed the trial court’s order denying the attorneys’ petition to compel arbitration. In doing so, it held that this arbitration clause was not adhesive, that generally, an arbitration provision in a retainer agreement between an attorney and a client was valid, that there was nothing ethically improper about such a provision in the initial retainer agreement, that no conflict of interest rules were applicable so that strict scrutiny of such a provision was not required, and that such an arbitration provision did not have to be in bold or otherwise large or distinct print, did not have to be in a particular place within the retainer agreement, and did not have to contain an express waiver of the right to jury trial.Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904

Client sued her attorney for breach of fiduciary duty arising out of attorney’s representation of her employment dispute. The superior court entered judgment for attorney and client appealed. The Court of Appeal held (1) the initial retainer agreement was not unconscionable, even though it permitted calculation of the contingency fee on gross rather than net recovery; (2) while there was a potential for a conflict of interest, there was consideration for a supplemental retainer agreement negotiated by attorney with client in which she committed to accept a minimum settlement, if offered; and (3) remand would be required to determine whether dual negotiation of client’s substantive recovery and of proposal that adversary pay attorney fees separately was an impermissible conflict of interest under facts of case.

Read v. State Bar (1990) 53 Cal.3d 394

An attorney was disbarred for, among other things, willful failure to refund unearned fees. In one of the instances which formed the basis of the discipline imposed, the attorney was paid \$900 to represent a client in a divorce. The attorney failed to perform the services as required. Attorney then agreed to refund \$200 of the \$900 paid, but failed to make the refund because she claimed she did not have the money. The Supreme Court rejected her argument that her failure to refund the unearned fees due to lack of funds did not constitute willful violation of the Rules of Professional Conduct: "Petitioner had not earned the fees. The money therefore should have been available for refund. Petitioner's use of the funds, which thereby made it impossible for her to refund the fees, was a willful act."

Reisman v. Shahverdian (1984) 153 Cal.App.3d 1074

Attorney represented client in a marital dissolution. Their fee agreement called for a “reasonable fee.” Client became disappointed with the property division and disputed the amount of fees earned by attorney. The parties submitted to binding arbitration through the local bar association, whose petition form recited that “no appeal or further proceeding will be possible” if the parties agreed to be bound. The Court held that this language could not be reasonably construed as a waiver of a party’s right to bring or contest post-arbitration court proceedings to vacate, confirm or correct the arbitration award (C.C.P. section 1285 et seq.), nor of the right to take appeals from the resulting orders or judgments. (But see *Pratt v Gursey, Schneider & Co.* (2000) 80 Cal.App4th 1105 where there was an extensive and unambiguous waiver of right to appeal after binding arbitration which was deemed enforceable.)

Responsible Citizens v. Superior Court (Askins) (1993) 16 Cal.App.4th 1717

The trial court disqualified a law firm from representing a corporation in an action against several defendants and real parties in interest, one of whom was a partner in a general partnership the law firm represented in an entirely unrelated matter. The Court of Appeal issued a writ of mandate directing the trial court to further consider the issue of whether an attorney’s representation of a partnership necessarily results in a conflict when it assumes representation adverse to one of the partners of the partnership “We hold here that an attorney representing a partnership does not necessarily have an attorney- client relationship with an individual partner for purposes of applying the conflict of interest rules. Whether such a relationship exists turns on finding an agreement, express or implied, that the attorney also represents the partner.”

Richards, Watson & Gershon vs. King (1995) 39 Cal.App.4th 1176

A law firm sued for its fees, but did not give the notice of right to arbitration required under B&P Code section 6201(a). Respondent moved for dismissal of the action because notice was not given. Although the law firm then filed an amended complaint which included a notice of the right to arbitration, the trial court dismissed the action believing that dismissal was mandatory under B&P Code section 6201(a). Considering legislative history and intent, the Court of Appeal held that dismissal where no notice was given was discretionary. In reaching this conclusion, the Court noted that in circumstances where a sophisticated client was aware of the right to arbitrate, “mandatory dismissal would not further the policy behind section 6201 and could, in fact, work an injustice. Making dismissal discretionary, however, avoids such problems by giving the trial court the opportunity to consider all the relevant facts before deciding whether to dismiss.”

Rus, Miliband & Smith v. Conkle & Olesten (2003) 113 Cal.App.4th 656

Lawyer Withdrawal Without Good Cause Waives Quantum Meruit Fee Claim

A real estate empire collapses. The estate’s bankruptcy trustee, through its attorney of record, sues the empire’s accountants for their role in the collapse. The parties settle. As part of the settlement, the trustee’s attorneys now represent the accountants in a suit against their malpractice insurer on a contingency fee basis (while still representing the trustee in enforcing the settlement). The accountants waive the obvious conflict. The accountants then write a letter

asking some questions as to the basis for the suit against their malpractice insurer, which they have every right to do. After all, it is just as likely that they will be sued for malicious prosecution as the attorneys if the lawsuit is unsuccessful. The attorneys, however, are offended. Perhaps they sense they are being set up to take the fall if the litigation fails and they and their clients find themselves sued for malicious prosecution. But they never say that. In their motion to withdraw as counsel, they merely cite, without elaboration, a break down in communications.’ The accountants, however, don’t think the differences are irreconcilable and oppose the withdrawal. Now chastened and humbled for being so uppity as to question their lawyers, they practically beg the attorneys to return. The accountants lose the withdrawal motion. The trial court will not force unwilling lawyers to work for willing clients. So the accountants thrash around for a new law firm, and eventually find one, but not one willing to take the case on contingency.

Then comes the surprise. With their new attorneys, the accountants settle with the malpractice insurer on favorable terms, obtaining a large sum of money. The original attorneys return to assert a quantum meruit claim on the settlement. Can they? Of course not. Taking umbrage at being asked facially legitimate questions by one’s client about the basis for a lawsuit is not justifiable cause warranting recovery in quantum merit. [Citation.] Clients have every right to ask questions of their lawyers as to the basis of a lawsuit, and the asking of such questions is not a reasonable basis to claim a break down in communications. If there was any break down, it was the lawyers who did not want to answer legitimate questions posed by their clients as to the validity of their clients’ claims against their malpractice carrier.

Sayble v. Feinman (1978) 76 Cal.App.3d 509

Under a contingency fee agreement providing that attorney shall be paid 28⅓% of “any money recovered”, and the case settled for a lump sum payment plus an annuity, the attorney is entitled to receive 28⅓% of the lump sum payment when it is received, and thereafter 28⅓% of each monthly annuity payment, upon receipt of each monthly payment. The Court calculated that if the fee agreement were interpreted so as to give the attorney 28⅓% of the gross dollar amount of the settlement immediately, it would result in the attorney receiving some 80% of the lump sum payment under the settlement. Such an interpretation, the Court opined, “would be unreasonable and absurd.” Any ambiguous language in contracts concerning attorney fees should be resolved in favor of a fair and reasonable interpretation. (However, the Court stated in dictum that had the fee agreement used the terms “the recovery”, or “the full recovery”, or “the value of the entire recovery”, the attorney’s argument for such an interpretation “might be persuasive.”)

Schatz v. Allen Matkins Leck Gamble & Mallory LLP, 45 Cal.4th 557 (2009)

*Overrules *Alternative Systems, Inc. v. Carey*, (1998) 67 Cal.App.4th 1034; Affirms dicta in Concurring Opinion in *Aguilar v. Lerner*, (2004) 32 Cal.4th 974.

Trial de Novo after MFA: Attorney with an enforceable binding arbitration agreement may proceed to binding arbitration after the conclusion of mandatory fee arbitration (“MFA”) under the Mandatory Fee Arbitration Act (“MFAA” or the “Act”), rather than the trial de novo set forth in the Act.

The California Supreme Court revisited the issue, not squarely addressed in *Aguilar*, of whether the client’s request for a trial de novo following an MFAA fee arbitration defeats the attorney’s

right to binding arbitration under the California Arbitration Act (“CAA”), where the parties had agreed to a binding in a written fee agreement. In *Alternative Systems*, the court of appeal had held that the MFAA preempted a binding arbitration clause in a fee agreement. The Court in *Aguilar* did not reach the issue, finding instead that because the client had alleged malpractice, he had waived his right to MFA under the Act. However, three justices, in a concurring opinion, found that *Alternative Systems* should be overruled. *Schatz* now overturns *Alternative Systems*.

Allen Matkins and client Schatz entered into a retention agreement including binding arbitration. After a fee dispute arose, and Schatz elected MFA. Following the MFA, Schatz sought trial de novo under MFAA rules. Allen Matkins moved to set aside the trial de novo and commence binding arbitration according to its retention agreement. Schatz contended that the retention agreement arbitration provision did not apply, because the contractual arbitration clause conflicted with the MFAA’s right to a trial de novo.

The court in *Alternative Systems* found that the 1996 amendments to the MFAA, which clarified that notification and stay requirements set forth in the Act applied equally to court proceedings or “other proceedings” such as arbitrations, made clear that the legislature intended to allow trials de novo under the MFA rather than allow contractually binding arbitrations, where the client so elects. The court relied in part on a Formal Advisory Opinion of the Standing Committee on Professional Responsibility and Conduct of the State Bar (now also in disregard), which concluded that a binding arbitration agreement between client and attorney “contravenes the letter and spirit of the MFA[A],” essentially because the statute is “a consumer-oriented scheme” in which “the commitment to be bound by arbitration” would appear to follow only after the client has been made aware of the right to judicial review after an MFAA arbitration.

The *Schatz* Court instead agreed with the concurring opinion in *Aguilar* that after MFA, parties with binding arbitration agreements would not proceed to trial de novo but instead would proceed essentially to “arbitration de novo.” The Court stated that to conclude otherwise would be to essentially repeal the CAA’s permission attorneys and clients to enter into binding contractual arbitration.

The Court compared the key purposes and structure of the CAA with the MFAA, citing the CAA more sweeping intent, thus requiring that contradictions with the MFAA be reconciled, rather than finding that the MFAA controls the CAA. Particularly of note are the mutual obligations of arbitration under CAA, its binding nature, that it covers fee disputes in and other causes of action such as malpractice, and that the arbitrators are chosen by the parties, rather than run through local bar associations. The *Schatz* Court construed the 1996 amendments to clarify that during an MFA, either a court proceeding or arbitration is stayed, but thereafter, the parties may proceed to trial de novo or contractual arbitration. In other words, under the MFAA, contractual arbitration is only stayed, not permanently dismissed.

Any other construction fails to give meaning to B&P §6201, and creates an illogical result—allowing a binding arbitration agreement to go forward if no MFA is requested by the client, but allowing an MFAA trial de novo request to nullify the arbitration agreement of the parties. Not only would it permit a client to evade arbitration by using the procedural device of asking for trial de novo, but it would mean that the non-binding arbitration of the MFAA would be a sham for the sole purpose of getting to court.

Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal.App.3d 1311

Discharged attorney who worked on a contingency has standing to participate in hearings to set the present value of a medical malpractice award that called for periodic payments. Citing *Cazares* with approval, the court stated that the discharged attorney's quantum meruit claim may appropriately be calculated with reference to the total recovery or to a percentage of the total contingent fee, and he, therefore, has a stake in the outcome of proceedings to fix the value of the award.

Schultz v. Harney (1994) 27 Cal.App.4th 1611

An allegation in a complaint that defendant attorney “in effect ... engaged in self-dealing to the detriment of his client by charging an excessive and unlawful fee” is sufficient to charge an act of professional negligence.

Scolinos v. Kolts (1995) 37 Cal.App.4th 635

Plaintiff, an attorney, referred a case to defendant, also an attorney, under an oral fee-splitting agreement. However, this was not disclosed to the client, nor did the client consent in writing as required by Rules of Professional Conduct, Rule 2-200. The trial court's granting of summary judgment in favor of defendant was affirmed on appeal. The Court of Appeal agreed with the trial court that the fee-splitting agreement was void as against public policy for failure to comply with the Rule.

Security & Exchange Commission v. Interlink Data Network (9th Cir. 1996) 77 F.3d 1201

The SEC obtained an order freezing assets against Interlink. Prior to the issuance of the order, Interlink had paid to its attorneys, pursuant to its fee agreement, a sum which the agreement characterized as an advance deposit and which had been, pursuant to the fee agreement, deposited into the attorneys' trust account. The SEC argued that the unused portion of the “advance deposit” was subject to the SEC's order; the trial court ruled that the entire “advance deposit” was earned upon payment by the client. The Ninth Circuit reversed holding that because the fee agreement in question clearly characterized the retainer as a “security retainer” and because the law firm deposited the money in its trust account, the unearned portion belonged to Interlink and was thus reachable by the SEC's order.

Severson & Werson v. Bolinger (1991) 235 Cal.App.3d 1569

Plaintiffs represented defendants under a fee agreement in which defendants agreed to pay plaintiffs' “regular hourly rates”. Defendants understood this to be fixed rates of \$90 and \$110 while plaintiffs understood this to include their practice of raising the hourly rates without notice to their clients.

The court found that although the requirements of B&P Code section 6148 are prospective only and did not apply in this instance, attorneys “have always had a professional responsibility to make sure clients understand their billing procedures and rates. This responsibility logically precludes any changes in agreed-upon rates without notification.” Because the fee agreement did

not contain any language regarding rate changes and the defendants could not determine from the bills that there had been a change in rates, the court found in favor of defendants.

Shaffer v. Superior Court (Simms) (1995) 33 Cal.App.4th 993

Plaintiff brought an action against the law firm that previously had represented him alleging, inter alia, that the law firm had charged an unconscionable fee in violation of Rule 4-200, breach of fiduciary duty, and malpractice. A portion of the services of the law firm were provided by a former associate of the law firm who was acting as a contract attorney when the services in question were rendered. Plaintiff sought to discover the hourly rate the contract attorney charged the law firm. The contract attorney and the law firm objected to the inquiry on the grounds of privacy.

The Court of Appeal denied discovery on the grounds of relevance, and did not reach the issue of privacy. The Court held that there is nothing in Rule 4-200 to suggest that the law firm's profit margin is in any way relevant to the issue of whether it had charged an unconscionable fee. The Court held that what was relevant to the issue of unconscionability are the factors enumerated in Rule 4-200, phrasing the issue as

“In other words, did plaintiff get what he paid for; did he get services from [the attorney] which were worth, as measured in the market place, the \$215.00 to \$250.00 per hour which [the law firm] charged him for [the attorney's work]? This question can be answered by analyzing the quality and necessity of [the attorney's] services and then comparing their cost with what would be charged for such services by other attorneys in the community who have experience and ability similar to [the attorney's]. If, in the legal marketplace, attorneys would have charged fees which are not disproportionately dissimilar to those charged by [the law firm] for those services, then it is difficult to see how such fees could be considered unconscionable under Rule 4-200.” (Emphasis original.)

Shepherd v. Greene (1986) 185 Cal.App.3d 989

After non-binding State Bar arbitration, defendant law firm timely filed a complaint in superior court, thereby seeking a trial after arbitration. (B&P Code, section 6204(b).) The complaint sought attorneys' fees in excess of the MICRA limits. The client's demurrer was sustained without leave to amend and the ensuing judgment of dismissal was affirmed.

Meanwhile, after the trial court sustained the client's demurrer but before any appeal had been sought, the client filed this separate action for correction of an error the arbitrators had made in the calculation of the award. That petition was filed 113 days after the award was served. A petition to correct an arbitration award must be filed within 100 days after the award is served. (C.C.P. section 1288.)

The Court of Appeal held that the 100 day period would be tolled until the results of the trial after arbitration became final. Until such a final resolution, the court held, the arbitration award is consigned to judicial limbo. The award will ordinarily remain in limbo forever, being superseded by the judgment in the post-arbitration court action. In some circumstances, however, the arbitration award could be revived. This case presents one of those instances when the party seeking trial after arbitration is unable to state a cause of action as a matter of law. In

such a case “the award is resurrected and becomes subject to correction and confirmation in accordance with Code of Civil Procedure section 1285 et seq.”

The court acknowledged that the client’s petition here was premature, having been filed before the law firm’s appeal had been decided, but the court went on to decide this appeal anyway, since no one would be prejudiced.

The rule announced in *Shepherd* would presumably apply to resurrect a non-binding award in a variety of factual settings.

Shiver, McGrane & Martin v. Littell (1990) 217 Cal.App.3d 1041

Within 30 days after the mailing of notice of a non-binding arbitration award, one of the two clients who had been parties to the arbitration filed a malpractice action against William McGrane, their former lawyer. The malpractice complaint did not expressly state that it constituted the commencement of an action for a trial after arbitration, and it named only McGrane, whereas his law firm had been a party to the arbitration along with McGrane.

After the 30 days had passed, Plaintiff filed this separate action to confirm the arbitration award. The client resisted confirmation, asserting that the filing of the malpractice action within 30 days after mailing of the notice of the award was tantamount to initiating an action for trial after arbitration.

The trial court disagreed and confirmed the award. Client then amended his malpractice complaint to include a demand for trial after arbitration, and returned to the lower court in this case with a request for reconsideration of the order confirming the arbitration award. The trial court refused to disturb its earlier order and the Court of Appeal affirmed.

The court held:

1. The malpractice complaint was not tantamount to an action for trial after arbitration; since the complaint did not mention the arbitration award, it could not put the lawyers on notice that the award was under challenge and was therefore legally insufficient to satisfy the requirement to commence a timely action for trial after arbitration.
2. Resort to the analogous rule that a notice of appeal should be liberally construed in favor of sufficiency would not aid the client because the absence of any mention of the award in the malpractice complaint was indispensable to the sufficiency of the document.
3. The allegations in the amended complaint attacking the arbitration award would not relate back to the filing date of the original complaint, because the original complaint was legally insufficient to raise a challenge to the award.
4. The client was not entitled to relief under Code of Civil Procedure section 473, nor under the holding in *Simpson v. Williams* (1987) 192 Cal.App.3d 285. The court rejected the *Simpson* opinion as unpersuasive and contrary to law. In the court’s view, the 30 day deadline for seeking a trial after arbitration is analogous to the deadline for filing a notice of appeal, which is jurisdictional. The court considered itself bound by the Supreme Court opinion in *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 834, fn.

5. The Supreme Court construed the deadline for appealing a finding of the Labor Commissioner as a statute of limitation, one that was ““mandatory and jurisdictional,”” barring any relief under section 473. The Shiver court saw no material difference between initiating a Labor Commissioner appeal and seeking a trial after arbitration, and deemed itself precluded by Pressler from allowing any relief under section 473.

Simpson v. Williams (1987) 192 Cal.App.3d 285

C.C.P. section 1013, enlarging time deadlines by five days when the triggering document is served by mail, does not apply to the 30-day deadline for seeking a trial after arbitration under B&P Code section 6204(b). However, C.C.P. section 473, allowing a party to be relieved of the consequences of his “mistake, inadvertence, surprise or excusable neglect,” is available on a proper showing to allow a late filing. The court’s conclusion that section 473 relief is available lends support to the argument that the time strictures throughout the fee arbitration statute are not jurisdictional, and that these time limitations may be extended or overlooked in a proper case.

Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal.App.3d 692

Attorney representing corporation does not become representative of its stockholders merely because attorney’s actions on behalf of corporation also benefit stockholders; as attorney for corporation, counsel’s first duty is to corporation.

Southland Mechanical Construction Corp. v. Nixen (1981) 119 Cal.App.3d 417

C.C.P. section 340.6’s 1-year limitations period for commencement of an action against an attorney for a wrongful act or omission applies to both breach of contract and tort legal malpractice actions.

Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal.3d 701

Late charge of 1½% was encouragement to pay the debts as opposed to a forbearance and therefore not subject to the usury law, at least as between merchants.

Spires v. American Bus Lines (1984) 158 Cal.App.3d 211

Five lawyers in succession had handled plaintiff’s case on a contingent fee basis. After the case settled, three of the lawyers asserted quantum meruit claims for the reasonable value of their services. The total of these claims exceeded the settlement amount. The trial court split the 40% contingent fee between two of the three lawyers, denying recovery to the third because he could not show that he had been counsel of record, apparently had no written fee agreement and did not appear at the hearing (although he had filed papers). The Court of Appeal reversed and held that the third lawyer was entitled to the reasonable value of his services under *Fracasse*, regardless of the existence of a written agreement. The court went on to say that the proper way to calculate the quantum meruit claims of the lawyers in a case where the total claims exceed the

contingent fee, is to award each lawyer his pro rata share of the fee, based on hours expended on the case.

State Bar of California Standing Committee on Professional Responsibility and Conduct
Formal Opinion 2008-175

If a prior attorney has a valid and enforceable charging lien in a matter, subsequent attorney MUST notify prior attorney in case of settlement, even over the objection of the client. Undisputed funds must be distributed to client. Interpleader for disputed funds is probably safest course of action. Same would apply to funds subject to a creditor's lien, where client instructs attorney not to distribute to the creditor

State Bar of California Standing Committee on Professional Responsibility and Conduct
Formal Opinion No. 2009-177

ATTORNEY RIGHT TO TAKE ACTION ON LIEN:

When a former attorney has valid lien rights in settlement proceeds, that attorney will not violate rule 4-100 by taking prompt and reasonable action to resolve a dispute with his or her former client over the amount which the attorney is entitled to receive, and any undisputed amount to which the client is entitled is promptly disbursed through a method upon which the attorney and client agree. In light of the different considerations applicable in any individual case, the attorney has a duty to consult governing legal authorities and make a reasonable determination of the amount to which he or she is entitled under the circumstances. If no agreement can be reached with the former client on these issues, the attorney has an affirmative obligation to promptly seek resolution of the dispute through arbitration or judicial determination, as appropriate. However, the attorney is not required to endorse a settlement check that is jointly payable to him or her, the client and successor counsel pending resolution of the dispute, because doing so would extinguish the attorney's charging lien under current California law.

State of California v. Day (1946) 76 Cal.App.2d 536

The legal rate of interest in this state is seven per centum. (Cal. Const. Art. XX, section 22.) The general rule is that interest may not be computed on accrued interest (i.e., compounded) unless by special statutory provision or by stipulation of the parties. (76 Cal.App.3d at 544.)

Stein v. Southern Cal. Edison Co. (1992) 7 Cal.App.4th 565

Prejudgment interest may be awarded when the damages are deemed certain or capable of being made certain (Civil Code section 3287(a).) The tests are (a) whether the debtor knows the amount owed; or (b) whether the debtor would be able to compute the damages, i.e., whether they are reasonably calculable. Denial of liability on the main theory of recovery does not make the damages uncertain. In this case, plaintiff was awarded prejudgment interest from the date plaintiff gave defendants notice of the claimed damages, on the amount of the jury award. The jury awarded the full amount of the claimed damages.

Stewart v. Gates (9th Cir. 1993) 987 F.2d 1450

Illegible, abbreviated time records, submitted in a form not reasonably capable of evaluation, do not satisfy the burden of submitting detailed time records justifying the hours claimed. It is an abuse of discretion for the trial court to award fees for hours not properly documented.

Stoll v. Superior Court (S-K-I, Ltd.) (1992) 9 Cal.App.4th 1362, rev.den. 12/31/92

A complaint against an attorney for breach of fiduciary duties arising from the attorney's demand and receipt of a secret commission from the seller while representing the plaintiff in the acquisition of real property from such seller, sounded in malpractice, and was barred by the one-year limitations period contained in C.C.P. section 340.6. Disagreeing with *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, the Court held "the statute of limitations within which a client must commence an action against an attorney on a claim for legal malpractice or breach of a fiduciary duty is identical. Unless tolled, a claim based on either theory falls within the statutory term 'wrongful act or omission' and must be commenced within one year after the client discovers, or with reasonable diligence should have discovered, the facts constituting the act or omission, or four years from the date of the act or omission, whichever occurs first."

Strong v Beydoun (2008) 166 Cal. App 4th 1404

Where plaintiff attorney entered into a fee split agreement with defendant attorney, but defendant client's consent was not obtained, the attorney has no action for quantum meruit against the client. However, note that attorney **would be able** to recover against the attorney who was attorney of record for "quantum meruit". *"It makes no sense to allow an attorney whose only connection to the client is through an unenforceable fee-sharing agreement to recover fees directly from that client. Strong's recourse is against Suojanen (the attorney.)"*

Stroud v Tunzi (2008) 160 Cal App 4th 377

Subsequent modification of contingency fee agreement also required to comply with B&P Code Section 6147 requirements. Original contingency fee agreement found to be controlling, subsequent non-complying agreement was invalid.

T & R Foods, Inc. v. Rose (1996) 47 Cal.App.4th Supp. 1

The Appellate Department of the Los Angeles County Superior Court held that under Rule 4-100 (preserving identify of client's funds), an advance fee must be deposited into an attorney's trust account, and an attorney's failure to segregate an evergreen retainer from his general funds constituted breach of fiduciary duties. **But see Arbitration Advisory 2011-01 for further discussion**

Trimble v. Steinfeldt (1986) 178 Cal.App.3d 646

Associate was employed in attorney's office, first on a salary and later on a percentage of the fees generated on the cases he handled. Later on, associate terminated his relationship with attorney. Associate then filed a notice of lien in this case, which was a contingency case on

which associate had worked, asserting a claim for his percentage participation in any award in the case, pursuant to his agreement with attorney. In expunging the lien, the Court held that in the absence of an agreement between the associate and the client, the associate had no lien rights. The associate's claim against attorney for compensation could not be enforced via the client.

Turner v. Schultz (2009) 175 Cal. App. 4th 974

PREVAILING PARTY FEES: Resolution of a discrete legal action for declaratory and injunctive relief relating to an arbitration agreement may constitute a “legal action or arbitration . . . to enforce . . . the agreement” and the prevailing party in that action may be entitled to fees.

The parties had an agreement that contained an arbitration provision. After a dispute arose under the agreement, plaintiff Turner refused to participate in arbitration. After the arbitrator determined that the arbitration would proceed, Turner filed a court action seeking a declaration that the arbitration could not proceed without a court order, and sought an injunction staying the proceedings until the defendants had compelled arbitration in court. Defendants prevailed on both the declaratory relief and injunctive claims, and court awarded costs and attorney fees as the “prevailing party.” Turner appealed, arguing that his injunctive and declaratory relief claims were not covered by that provision, and that fee awards in the arbitration were only permitted by the arbitrator on final award.

The arbitration agreement provided that “in the event of legal action or arbitration . . . commenced of any kind or character, to enforce the provisions of this Agreement . . . the prevailing party in such action shall be entitled to all costs and reasonable attorney's fees incurred in connection with such action.” The court of appeal found that this provision applied claims brought offensively or defensively to enforce or avoid arbitration, including declaratory and injunctive relief actions. It also that because the fee provision in the agreement applied to any legal action of any kind or character, a separate legal action for declaratory and injunctive relief met the provision's requirements, and defendant prevailed on that action.

Venegas v. Mitchell (1990) 495 U.S. 82

Client hired an attorney to prosecute a civil rights claim under 42 U.S.C. section 1983. Their written fee agreement provided that the attorney was entitled to 40% of the gross amount of any recovery. After plaintiff won a judgment of \$2.08 million, his attorney moved for attorney fees against the defendants under 42 U.S.C. section 1988 which provides, in the court's discretion for an award in favor of the prevailing party for a reasonable attorney's fee. The trial court awarded \$117,000 in attorney's fees. Client then claimed that his attorney was entitled only to the amount of the attorney's fee award, not the 40% contingency fee. The Supreme Court disagreed, holding that the attorney is entitled to the contract contingency fee. It held that “[w]hat a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the ‘reasonable attorney's fee’ that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingency-fee contract.” (495 U.S. at 90.)

Vorys, Sater, Seymour & Pease v. Ryan (1984) 154 Cal.App.3d 91

Due process does not require states to adopt mandatory fee arbitration. The entry of a sister state judgment in California, based on an Ohio judgment obtained by an Ohio law firm against its California clients, will be allowed to stand even though Ohio, unlike California, does not provide for fee arbitration. The client's right to arbitrate with his attorney under California law, is not a right that is essential to fundamental fairness, and the absence of fee arbitration in Ohio fails to create a defect in the Ohio proceedings that rises to the constitutional proportions that must be present before a sister state judgment will be denied confirmation. Clients therefore presented no grounds that would empower a California court to decline to give full faith and credit to the Ohio judgment.

Wager v. Mirzavance (1998) 67 Cal. App.4th 1187

A father retained an attorney to represent his son in a criminal matter. The retainer agreement named both parents as guarantors. When a fee dispute arose, the attorney filed suit against the parents without giving notice of the right to arbitration required by BAP Code 6201(a). The trial court dismissed the action for failure to provide the notice. The Court of Appeal affirmed, holding that the father was entitled to such notice. "The crucial question in determining who is entitled to arbitrate an attorney fee dispute, and thus to whom the attorney must give notice under 620.1(a), is not simply who directly benefits from the attorney's provision of legal services,' but 'who is the attorney's debtor on account of the services provided..'"

(Distinguish from Natl. Union Fire Ins. Co. of Pittsburg v. Stites (1991) 235 Cal. App.3d 1718, where it was held that an insurance carrier obligated to pay for Cumis counsel did not have the right to initiate fee arbitration against the attorney, because the carrier was not the client.)

Waltrip v. Kimberlin (2008) 164 Cal.App 4th 517

Where there are competing liens, the general rule is that, all things being equal, liens have priority according to the time of their creation. fn.3 (Civ. Code, § 2897.) An attorney's lien on a judgment for services prevails over later encumbrances. (*Cetenko, supra*, 30 Cal.3d at p. 534; *Pangborn, supra*, 97 Cal.App.3d at p. 1051.) Attorney lien created in retainer agreement, prevailed over liens filed in law suit after the matter was filed

In Re Marriage of Wickander (1986) 187 Cal.App.3d 1364

In a dissolution of marriage action, wife signed a settlement agreement in the absence of her attorney, although she had an attorney of record that time. The Court held that the settlement agreement was void for violation of the rule of professional conduct prohibiting attorneys from communicating with represented parties on a controverted matter without the express consent of counsel. This case supports the general proposition that a contract which violates the Rules of Professional Conduct is unenforceable.

Winterrowd v. American General Annuity Ins. Co., No. 01-57184, February 7, 2009

Fees for Non-Admitted Attorney: Out of state attorney representing client in 9th Circuit may recover fees while not admitted pro hac vice if the attorney could have been admitted pro hac vice had he applied, and did not sign pleadings, appear in court, or enter the state to work on the

case.

A California-admitted attorney and his Oregon attorney-father represented clients successfully in an action and, as a result of the terms of a settlement agreement, applied to the court for their fees relating to the matter. The Oregon attorney was neither admitted to the California bar nor had he applied for pro hac vice status. The court refused to award fees to the Oregon attorney because he violated the State Bar Act and Central District local rules in representing the client in California, relying on *Birbrower v. Superior Court* (1998) 17 Cal. 4th 119 128.

The 9th Circuit overturned the decision, recognizing that in modern times lawyers often do business in group settings across state lines via internet, telephone, etc. The court also found that admissions rules and procedure for federal courts are independent of those that govern admission to practice in state courts.

The 9th Circuit found that, unlike the contacts in *Birbrower*, here the Oregon attorney did not practice law in California, noting that the primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations. Here, there was no retainer with the out of state attorney, his services at issue here were performed entirely in Oregon, he did not sign pleadings or appear in court, and the arrangement between attorneys was more closely analogous to a partnership. As a result the 9th Circuit found that the relationship did not result in practicing law in California. The 9th Circuit considered the pro hac rules of the Central District, and found had Wheatley applied, he would have been pro hac vice. See, *Spanos v. Skouras*, 364 F.2d 161, 168 (2d Cir.1966) (en banc). As a result, the 9th Circuit found Wheatley entitled to fees.

Woods v. Superior Court (1983) 149 Cal.App.3d 931

Attorney represented a family corporation owned by husband and wife. In a divorce between husband and wife, attorney commenced to represent the husband, to whom he admitted he developed a strong sense of loyalty. The lower court denied wife's motion to disqualify attorney, "on the ground that nothing was contained in wife's declarations to demonstrate that he ever acquired any 'knowledge or information which would be injurious' to wife." The Court of Appeal reversed. Relying on the fact that wife was a major owner of the family corporation, the Court found that attorney, as counsel for the corporation, had a conflict of interest in representing the husband in the divorce.

Yates v. Law Office of Samuel Shore (1991) 229 Cal.App.3d 583

Lawyer represented heirs in a wrongful death action based on medical malpractice. At the conclusion of the case, lawyer calculated his statutory fee under B&P Code section 6146 on each heir's portion of the recovery, resulting in a fee that was almost double what it would have been if calculated on the total recovery. In addition, lawyer subtracted as a cost, the fees of an attorney he hired to represent the heirs on appeal. The Court held that when all heirs are represented by the same lawyer, the statutory limitation applies to the judgment as a whole rather than to each heir's share, that the fees paid to another lawyer for the appeal could not be considered a cost, and that section 6146 prohibits charging a separate fee for an appeal.